Sanctuary for Refugees?

A Guide for Congregations

The United Church of Canada

Revised 2004

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Refugees are the shattered angels, the symbols of the brokenness and injustice of our modern world. Our response to them is our response to the chaos in our society and ourselves.

If we understand that God reveals the 'most holy' through the 'most vulnerable,' we understand with whom we are called to be and how we are to witness. To be with the sojourners, the refugees, is to be with and bear the pain of the world and, in so doing, to risk the inversion of all our cultural values and comforts. We cannot embrace the brokenness and remain unscathed. The refugees in our midst, victims of our own society's failure to respond, call to question the meaning of life. If we hold human life as a sacred gift and reflection of God, then we realize we are facing the 'holy.' The confrontation will define the parameters of our being.

When we are faced with injustice in our own society, in our own refugee determination system, we may consider the 'moral witness' of providing sanctuary. This option protects the individual at risk in that it allows the system to respond, to self correct. Really, sanctuary as a prophetic action displays ultimate respect for the law and the justice it demands of it. It should not be carried out in the spirit of defiance (as in counsel to go underground), but in the hope of correction or transformation.

Our struggle comes in standing with the 'poor, the dispossessed, those determined non-status,' in suffering the day-to-day insecurities and in sustaining commitment. We call out in the wilderness so that the authorities may hear. We exhaust ourselves with the physical arrangements and endure the boredom, the frustration, the infighting of the endless days, weeks, or months as we wait for resolution. In the uneven and at times disheartening process of working for social change, we may stumble on a revelation. The focus of our attention, a refugee facing deportation, once a symbol of the world's despair, becomes the portal of God's grace. There is sustenance for our struggle if we are open to having our understanding, our mission, our lives radically changed. The conversion will consume and confound our congregation's life. The covenant between refugee and congregation may be sorely tested; the claimant may not attain permission to remain in Canada. Ministering to God's reign among us will incur conflict and loss and test our faith.

To offer sanctuary to a refugee whose life is at risk is life-giving and consuming. We can never be adequately prepared. The test, however, is not what we do, but with whom we do it. Those angels are there to challenge us to seek our own refuge.

Chris Ferguson
in discussion with
Heather Macdonald

Introduction

What Is Sanctuary?

According to the *Oxford English Dictionary*, the term *sanctuary*, aside from its primary meaning of a "holy place," identifies a locale ("a church or other sacred place") where, under medieval law, "a fugitive from justice or a debtor was entitled to immunity from arrest." The original concept of a right of sanctuary, essentially identical with that of a *right of asylum* (French: *droit d'asile*), meant that forcible removal from this inviolable place of refuge or protection constituted "*sacrilege*."

Sanctuary for Refugees

In recent years we have seen a revival of sanctuary movements in North America and Europe. Supporters have been prepared to defy their governments in order to prevent the forced return of refugees denied asylum. Aware of the revival of the sanctuary tradition within the contemporary context, the 34th General Council of The United Church of Canada (1992) endorsed "the moral right and responsibility of congregations to provide sanctuary to legitimate refugee claimants who have been denied refugee status...."[1]

Why this Resource?

This handbook is for congregations considering a request for sanctuary. Fundamentally, the decision to offer or to decline sanctuary rests with the congregation and must be an informed decision, as well as a decision of faith. Decisions of faith benefit by everyone involved in the decision-making process understanding the implications of their potential actions as much as is possible. This resource explains the process of offering sanctuary, but does not replace spiritual and legal counsel for the congregation or the refugee.

We will sketch here, in brief:

1. the centuries-old roots of sanctuary
2. how sanctuary has entered the Canadian scene
3. the basics of Canada's refugee determination system, as legislated and administered in recent years
4. the legal implications of offering or supporting sanctuary
5. the practical consequences and obligations of sanctuary

[1] Paralleling this initiative, the Social Affairs Commission of the Ontario Conference of Catholic Bishops (June 1993) declared that: "The decision in conscience to offer sanctuary, which is a decision of last resort, is a part of every major faith tradition."

The Heritage of Sanctuary

Ancient, Medieval, and Modern Roots

The Western Judeo-Christian tradition provides the basis for the reintroduction of the institution of sanctuary in North America and Europe. Sanctuary began with God's directive to Moses to establish "six cities of refuge for the Israelites, for the resident or transient alien among them, so that anyone who kills a person without intent may flee there." (Numbers 35:13,15) Based on this distinction, these cities were open to all fugitives. Elsewhere in the ancient world of Egypt, Greece, and Rome, sanctuary practices also gave shelter both to the prosecuted (premeditated murderers excepted) and the persecuted.

In medieval times, there was a parallel church law that was as strong as, if not stronger than, civil law. According to the *Encyclopedia of the Social Sciences* (1934), "Contractions and expansion of the privilege [of sanctuary] depended on whether power lay in the spiritual or the secular authority." In England, sanctuaries and sanctuary law developed over many centuries, eventually linking sanctuary to the banishment system. Throughout the Middle Ages, some forms of sanctuary persisted as 'internal asylum,' a sphere of immunity *within* the realm.

With the emergence of the modern state, a unitary system of law became the norm. In Britain, sanctuary (in criminal cases) was officially abolished in the 1620s; in France, the right to claim sanctuary existed until the French Revolution, a century and a half later. Given the nation state's monopoly on authority, medieval sanctuary, a system of *internal asylum resting on a dual system of law*, faded into near oblivion.

In the modern era the state itself would offer asylum to fugitives and would decide which categories of those in flight were deserving of protection. Political asylum means that the asylum seeker flees the home country for a safe harbour; the receiving state, at its discretion, may grant political asylum to the fugitive on its own territory. By the l9th century, the typical candidate for political asylum was a European leader of a defeated nationalist movement. In the latter half or the 19th century and the 20th century, however, the candidates were groups discriminated against by national (ethnic) identity, religion, or 'race,' and so on.[2] Now, refugees were coming to North America en masse. But, since refugees' protection is subordinate to national policy, many among them were labelled "illegal aliens." These refuge seekers became fugitives twice over–first fleeing in search of external asylum and then forced to seek internal asylum. By the late 20th century, sanctuary movements arose to offer safe haven in the face of limited political asylum.

Canada as Sanctuary?

Canada was 'emerging' at a time when the pre-modern form of sanctuary (as internal asylum) had almost disappeared. Yet, in the European imagination, the whole of the New World was

[2] Examples of this modern form of "sanctuary" included the protection provided by the Underground Railroad for fugitive slaves headed for another sort of sanctuary in Canada prior to the U.S. Civil War; or, in this century, the World War II sanctuary for Jewish refugees in the French village of Le Chambon-sur-Lignon, or the organized transport of the Danish Jews to Sweden.

seen as a sanctuary, far from the religious and political oppressions of the Old World. The assumption was that the door would be open to all those who needed a safe haven.

In the late eighteenth century the American Revolution had divided the continent between the new United States and what was to become Canada and created the first American refugees or Loyalists.[3] Two later periods in history also involved overland flights to Canada. Prior to the outbreak of the U.S. Civil War in 1860, fugitive slaves headed for a Canadian sanctuary; and, little more than a century later, U.S. war resisters of the Vietnam War escaped the armed forces draft by fleeing to Canada. In both of these periods, Canada became the terminus of an Underground Railroad. Canadian acceptance of both groups was rather mixed; yet there was no movement to initiate their forcible return. At the end of both wars, some former residents of the U.S. remained and settled in Canada, while many others voluntarily returned when it became safe to do so.

In fleeing to Canada, these 'refugees' did not apply for political asylum, but acquired sanctuary there as immigrants in a land that was being peopled by immigrants. Nevertheless, up until very recently, Canada's immigration policy was restrictionist and racist. Canada's "closed door" response to the European Jewish refugees of the 1930s is dramatically documented in *None Is Too Many*.[4]

In the post-World War II years, Canada opened its doors to refugees, thus acquiring a reputation in this respect as one of the world's most generous countries. There were Hungarians in the 1950s, Czechs a decade later, then Asians from Uganda, and Chileans in the 1970s. Between 1945 and 1978 a quarter of a million refugees had been admitted to Canada. The late 70s brought a stream of Vietnamese refugees (60,000 in a two-year period). In 1986 the people of Canada were awarded the Nansen Medal by the United Nations High Commissioner for Refugees (UNHCR) in recognition of the country's openness to refugees.

Changing Times

Canadian immigration policy had long favoured the resettlement of refugees selected abroad according to immigration criteria. However, technology made Canada increasingly accessible, giving rise to what bureaucrats dubbed "irregular movements" of uninvited asylum seekers. In the 1980s, more refugees began choosing Canada. Plane, boat, and busloads of "asylum seekers" showed up on our borders. Administrative measures were introduced to deter spontaneous arrivals and tighten borders. The Immigration and Refugee Board (IRB), with its elaborate process of decision-making (determining refugee claims) and the Refugee Deterrents and Detention Act were established. (However, from the beginning, some believed the refugee determination system was compromised by its lack of appeal and the political nature of the appointments to the Board.)

In 1986 with the announced intention of controlling Canada's borders, the authorities introduced measures (such as temporary turn backs at the Canada/U.S. entry points) designed to deter those with "manifestly unfounded" refugee claims, or false refugees. When a boat of

[3] While their status as refugees by today's definitions can be questioned, the size and impact of the Loyalist northward exodus was significant in relation to population, foreshadowing the kind of outflow characteristic of later wars of national liberation. See A.R. Zolberg et al., *Escape from Violence: The Refugee Crisis in the Developing World* (New York: Oxford University Press, 1989).

[4] See Irving Abella and Harold Troper *None Is Too Many: Canada and the Jews of Europe, 1933-1948* (Toronto: Lester and Orpen-Dennys, 1982).

Tamils arrived on the East Coast of Canada, fears were fed that hoards were coming to Canada in this way, and reports carried undertones of invasion. The response (including the calling of an emergency session of Parliament in summer 1987) contributed to public apprehension about refugees.

Increased pressure to reduce arrivals on our shores led to an exaggeration of the numbers of 'abusers' in the system, and refugees, claiming their right to seek asylum, were labelled as 'queue-jumpers.' Over the years, various measures to interdict or turn back spontaneous arrivals were introduced. The 'developed' countries have found the safe third country concept (restricting a refugee's right to claim asylum to the first 'safe' country they enter) to be an effective interdiction measure. In the 80s, European Union countries signed such an agreement, and the concept was introduced into Canadian legislation, although at that time no country was designated as a "safe country." (In 2002, the U.S. and Canada signed a Memorandum of Understanding; when this agreement is implemented, refugees entering from the U.S. will be turned back.)

Interdiction measures, such as the imposition of visas on refugee producing countries, carrier sanctions (contributing to instances like the Maersk Dubai[5] incident), airport screening, exclusion, and safe third country do not distinguish between refugees and migrants and violate an individual's right to seek asylum.

During the 90s and into this century, the government's hardening attitude prevailed; refugees became equated with criminals and, post 9/11, with terrorists. Today, the refugee claimants who manage to reach our shores are now restricted to "a once in a lifetime claim" under the Immigration and Refugee Protection Act (June 2002). Aiming for efficiencies, the new Act (IRPA) also reduced the panel of decision-makers hearing the refugee claim to a single decision-maker. In response to opposition from the United Nations High Commissioner for Refugees and Inter-American Commission on Human Rights, a merits-based appeal was included in the legislation. However, as of January 2004, the appeal had not been implemented; until the appeal comes into force, "refugee determinations" will continue to be made without the benefit of a sober second opinion or an effective way to correct factual errors. This, in turn, has increased the chances of bona fide refugees being deported.

Negative decisions (the acceptance rate hovers around 47 per cent), the inability to address errors, and the consequent removal orders can put some refugee claimants in danger. It is no surprise, therefore, that some claimants who have been refused choose to go underground rather than risk forced return. For others, the difficult last resort—sanctuary within a Canadian church—may prove to be an option.

It is the rejection of genuine refugees and the fear of their persecution or even death upon deportation that has ignited the concern of people of goodwill and invited calls for sanctuary. But we must also remember that church sanctuary is essentially a confrontational course of action. The following section will focus on the legal considerations of sanctuary.

[5] On May 24, 1996 the container ship, Maersk Dubai, docked in Halifax. It was alleged that three stowaways had been put overboard (to avoid the carrier fee of $7,000 per person brought illegally into Canada). The two Filipino seamen, who had protected a stowaway, in turn sought the protection of Canada.

Sanctuary and the Law

Those who offer sanctuary must realize that they may be breaking the law. A refugee applicant who has lost her or his case and seeks to avoid removal from Canada commits an illegal act; *assisting* a refugee in that act of avoiding removal (offering church sanctuary) is breaking the law. Any protection under the Constitution is uncertain.

In Canada as elsewhere, despite the illegality, people may feel *compelled* to help the refugee on their doorstep. At the same time, it is quite possible that the government will take counter measures, including criminal prosecution. In practice, prosecution is discretionary; the authorities can also decide, for political reasons, *not* to bring charges. In either case, those who offer sanctuary must be well informed about the relevant law and have access to competent legal counsel. If the authorities should decide to press charges, the congregation must be prepared for the consequences. Discretion is vested in the Canada Border Services Agency and law enforcement officers in the prosecution and enforcement of statutes.

Offences Related to Providing Sanctuary

The Canadian Immigration and Refugee Protection Act and the Criminal Code (which overlap considerably) both contain numerous provisions specifying illegal acts in this area: to knowingly induce, to aid or abet, or to counsel anyone to contravene these provisions is to commit a crime. For example, if the claimant acts in defiance of a removal order, a sanctuary worker who aids or counsels the claimant in such defiance could be charged and convicted. There are further offences of being an "accessory after the fact" and the more serious charge of "conspiracy." These are areas where, under certain circumstances, multiple convictions are possible, leading, of course, to heavier penalties.

The penalty for the offences of aiding or abetting a person to contravene the Immigration and Refugee Protection Act—for example, encouraging or counselling someone to refuse to comply with a removal order—is up to two years' imprisonment, or a fine of $50,000, or both.

At present, there may be no effective defences. The bases for a successful defence, in terms of case law and legal precedent, have scarcely been laid. This present state of the law does not preclude legal challenges, but offers little chance of success. The law in relation to these defences is outlined in more detail in Appendix II (page 20).

Sanctuary in Action

Considering the Case

A congregation or individual considering a request for sanctuary to support a person who has had his or her refugee claim rejected must learn as much as possible about that person to determine whether or not this is a *bona fide* claim. Over two to three interviews, with at least one person present consistently throughout and a translator if necessary, it is essential to learn as much as possible about the person's story. In the interest of clarity, no reasonable question should be ignored or considered impolite or irrelevant.

Check the merits of the case with representatives of the United Nations High Commissioner for Refugees and Amnesty International–Canada office. (See Appendix III, page 25, for addresses.) Find out whether the country has a history of gross and systematic human rights violations and tolerates the persecution of a minority group (e.g. religious, ethno-cultural, linguistic). Country Reports are also available through regional Documentation Centres of the Immigration and Refugee Board.

Not all failed claimants warrant sanctuary, nor would they benefit from it. Other forms of support and counselling may be more appropriate.

Questions to Consider...

...For and About the Refugee

1. Has the individual exhausted all administrative and legal provisions available in the refugee determination process?
   a) Would the individual be at risk on return to the country of origin? Risk can be physical or psychological. Under the Immigration and Refugee Protection Act, victims of torture are not to be returned to the country of torture. Has a Pre-Removal Risk Assessment been considered?
   b) Are there compelling compassionate or humanitarian reasons for the individual to remain in Canada? Has a Humanitarian and Compassionate Review been considered?
   c) Has this person been denied human justice within Canada or according to international laws?
2. Does the individual have a history of criminality or terrorism?
3. Can the case and the individual withstand the scrutiny and the stress of long-term sanctuary?
4. Can the individual and/or family abroad tolerate public and media attention?
5. Has the refugee been informed about the longer-term difficulties (schooling, medical needs, and so on) of sanctuary and that success is not assured?

...For the Congregation

1. Does the congregation understand the risks involved in this act of civil disobedience? (e.g. financial, legal, and moral risks)
2. Is there capacity (financial, spatial, volunteers) to support a long-term sanctuary?
3. Is there broader commitment across the congregation for this action? (Sanctuary that drags on over months can prove divisive to community.)
4. How and what residential accommodations can be made for the refugee family? (e.g. is plumbing adequate?)
5. Can the congregation tolerate public and media attention?

The congregation must consider its capacity to support a refugee, and the appropriateness of this measure to the case. If sanctuary appears to be a viable option under the circumstances, carefully weigh the commitment and the consequences. Sanctuary should *not* be undertaken as a personal rescue of an individual or his/her family.

An inclusive discussion process that allows for objective review of the sanctuary question is necessary to an informed decision. The Board at least must approve a formal motion in favour of sanctuary, and a congregation-wide conversation is strongly recommended.

Sanctuary is a desperate measure, demanding serious consideration and thought; a careless decision will endanger this particular case and future cases and jeopardize the church's credibility.

How Canada's Refugee Determination System Works

Standards for Eligibility

Canada determines claimants to be refugees according to its interpretation of the definition of the Geneva Convention (1951) and the 1967 Protocol.

> A refugee is any person who...owing to well-founded fear of being persecuted for reasons of RACE, RELIGION, NATIONALITY, membership of particular SOCIAL GROUP or POLITICAL OPINION, is outside the country of his/her nationality and is unable to or, owing to such fear, is unwilling to avail himself or herself of the protection of that country; or who, not having a nationality and being outside the country of his/her former habitual residence...is unable or, owing to such fear, is unwilling to return to it.

This definition fits the political reality in which it was conceived. It has limitations for the present situation. The Cartagena Declaration on Refugees (1984) and the Organization of African Unity Convention (1969) both recognize extended refugee definitions that reflect a complex range of root causes. These definitions and the perspectives they represent do not apply to Canada's Refugee Determination. To be recognized as refugees, refugee claimants must fit the narrow Geneva Convention definition and base their claim on one of the five categories.

Since the introduction of the Immigration and Refugee Protection Act in June 2002, refugee claimants can also be accepted if they are found to face a danger of torture or risk to their lives or a risk of cruel and unusual treatment or punishment.

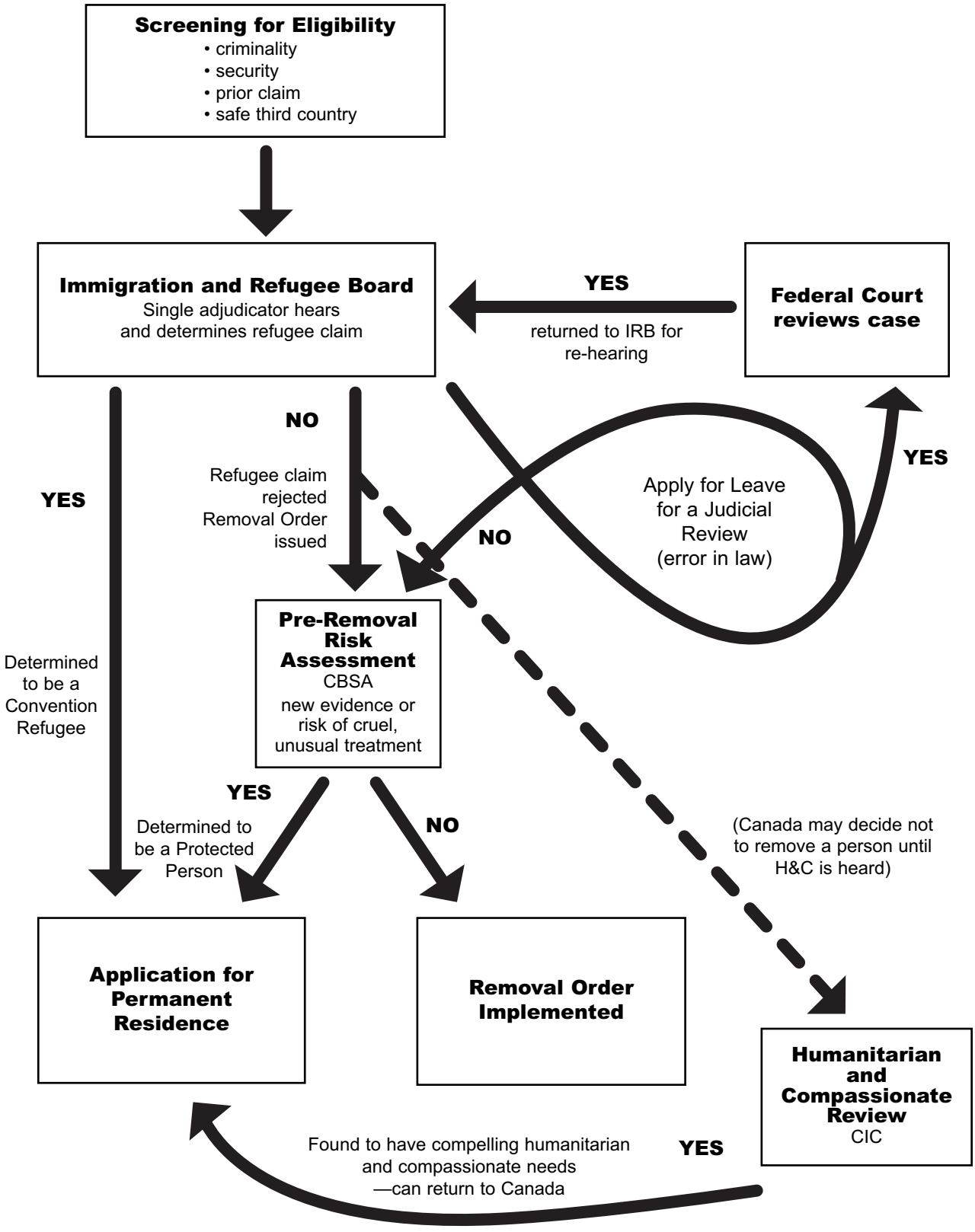
Process

Eligibility

Refugee claimants can be found ineligible for a hearing if their claims are found inadmissible on the grounds of serious criminality, organized criminality, security risk, or human or international rights violations. Unfortunately, these categories are highly politicized and, because of inadequate procedural safeguards, innocent people can easily be found inadmissible.

Claimants are also ineligible if they have been recognized as a Convention Refugee by another country to which they can be returned, or if they have previously made a refugee claim in Canada (whatever the result). In the near future, many refugee applicants arriving from the U.S. (where it is considered they could make a claim) will be turned back at the border under the terms of the Safe Third Country Agreement, signed by Canada and the U.S. in December 2002.

Canadian Refugee Determination Process



When the Agreement comes into force, only certain categories of refugee claimants, such as immediate family members of Canadian residents or citizens and unaccompanied minors, will be allowed to cross the border to make a refugee claim in Canada.

The Immigration and Refugee Board (IRB) Refugee Protection Division

Applicants initiate a refugee claim by notifying an officer of Citizenship and Immigration Canada at any port of entry or at a Canada Immigration Centre. The officer will determine whether the claim is eligible to be heard and will refer eligible claims to the quasi-judicial tribunal, the Immigration and Refugee Board.

Refugee claimants within Canada who are eligible come before the Refugee Protection Division of the Immigration and Refugee Board. Refugee applicants fill out a Personal Information Form (PIF) that forms the basis of their hearing. Some straightforward (manifestly well-founded) claims may be expedited without a formal hearing; normally, a single decision-maker determines the refugee claim. Approximately 47 per cent of the cases heard are determined to be Convention Refugees or Protected People, but the acceptance rate varies greatly across the country.

The Convention Refugee or Protected Person Decision and Permanent Residency

Applicants who receive a positive decision are determined to be Convention Refugees or persons in need of protection. Both categories are called "protected persons." They are eligible to apply for permanent residence (also known as "landing").

However, some individuals could be prohibited from landing (permanent residence) in Canada. The lack of proper documentation disallows a Convention Refugee's "landing" application. (This was the case for several thousand Somali refugees.) If documentation is in order and if the processing fee ($550 per applicant 22 years and older; $150 per applicant under 22 years and unmarried/ not in a common law relationship) can be met, a Convention Refugee can apply for "landing" or permanent residence for him/herself and immediate family members.

Review of the Decision

An individual who receives a negative decision from the Immigration and Refugee Board (IRB) has few options. The Immigration and Refugee Protection Act (June 2002) introduced the Refugee Appeal Division, but the Act has been implemented without the appeal for refugees. An unsuccessful claimant has 30 days to leave the country voluntarily or 15 days to apply to the Federal Court for a judicial review of the case. Usually claimants can stay in the country while the Federal Court is hearing their case. "Leave" for a judicial review is granted only if there has been an error in the law. When "leave" is granted, the case is heard by the Federal Court. If the Federal Court decides in favour of the claimant, the case is returned to the IRB for a re-hearing. If "leave" is denied or the Federal Court rejects the application, claimants can apply for a Pre-Removal Risk Assessment.

Administrative Reviews

Pre-Removal Risk Assessment

Most people placed under a removal order can apply to the Canada Border Services Agency (CBSA) for a Pre-Removal Risk Assessment (PRRA). This administrative review is to protect individuals for whom there is evidence since the IRB made its decision that they are Convention Refugees or face risk of torture, a risk to life, or a risk of cruel and unusual punishment if

removed from Canada. The PRRA cannot be used to argue that the original decision of the IRB was in error. While a decision on the PRRA is being made, an applicant's removal order is stayed.

If the risk assessment is positive, the claimant is a "protected person" and can apply for permanent residence. However, if the claimant's claim is inadmissible for reasons of security, serious criminality, organized criminality, or human or international rights violations, or was rejected by the IRB on the basis of one of the exclusion clauses, a positive determination will result only in a "temporary stay of removal."

If a negative decision is received the applicant must comply with his or her original removal order. Canada Border Services Agency will make removal arrangements.

Humanitarian and Compassionate Review

Rejected claimants can apply to Citizenship and Immigration Canada for an Humanitarian and Compassionate Review (known as H&C) if they have a compelling reason to remain in Canada (family circumstances, long-term stay or commitment, or other compassionate considerations) and the resources to pay–$550 per adult ($150 under 22 years).

The non-refundable fee excludes some applicants; others are deterred by the restrictive interpretation of humanitarian and compassionate reasons and the low acceptance rate. However, a congregation may decide to pay the application fee so that all available options have been tried; this is necessary if the case is to be forwarded to the international courts (i.e. Inter-American Commission on Human Rights).

There is no stay of removal pending a decision on an humanitarian and compassionate application, and applications routinely wait years before a decision is made. However, in some cases, Citizenship and Immigration Canada may on a discretionary basis, and in consultation with Canada Border Services Agency, decide not to remove a person until their application has been decided.

Political Intervention

All domestic administrative and judicial options should be exercised before seeking an appeal to the Minister of Citizenship and Immigration and/or appealing to the international courts. When all other options have been exhausted, the one remaining hope is for political intervention. Under the Immigration and Refugee Protection Act, the Minister of Citizenship and Immigration and the Minister for Public Safety can exercise his or her discretion to allow a person to stay in Canada. It could be prudent to appeal to both Ministers and copy the Prime Minister.

Legal Limbo

There are countries to which no removals, except criminals, are made owing to a generalized situation of violence or humanitarian disaster in all parts of the country (e.g. in mid-2003, there were temporary stays of removal in effect to Afghanistan, Burundi, Democratic Republic of Congo, Iraq, Rwanda, and Zimbabwe). People from such countries who have had their claims rejected and have a removal order against them, may be allowed to remain in Canada indefinitely. The rejected claimant's removal order stands ready to be implemented, however, upon improvement in the country's situation.

CAUTION: This is the division of responsibilities within the Canadian government as understood as of February 24, 2004, but should not be relied on for the long-term future.

The Congregational Decision

Understanding the Gravity of the Situation

When you have compiled the information about the case and the immigration process, you will need to consider the potential consequences of a decision both for the congregation and for the claimant—a person seeking asylum is especially vulnerable. Be very careful not to hold out false hope. Ensure that everyone understands the options and the implications these hold for the future.

If a refugee claimant makes a request for sanctuary and thereby is about to become a test case, does he or she truly understand what is at issue? Through an interpreter, if necessary, inform the person that a positive result, at least in the short-term, is unlikely. Sanctuary is an open-ended invitation; resolution could take weeks, months, and even years.

Can the claimant(s) and the case withstand intense scrutiny? The success of sanctuary depends upon a high public profile, constant media attention, and the moral support of the general populace.

Is the claimant willing and able to live under the glare of such publicity while under the physical confines of sanctuary? Is there anything about the person, his or her family, or past that may come to light to discredit the campaign?

Is publicity a danger to family members in the country of origin?

Considerations for the Congregation

This is the time when the congregation and its members are faced with difficult moral decisions. Not every claimant should remain in Canada. Not all claimants are refugees or at risk upon deportation.

In some cases, the most appropriate action for the church would be to support some of the refused refugees with counselling and assistance in preparation for the return home. Other cases may qualify under the various immigration categories. For those who have a clear need for protection and were denied justice in Canada and for whom there are no other options, the congregation may decide upon sanctuary—with the hope of convincing the government to reconsider its decision to deport the refugee.

However, where the congregation is convinced justice requires the offer of sanctuary, it must understand the consequences.

The more probable and practical consequences of the sanctuary decision involve wear and tear on both the facilities and the fellowship. Should the authorities decide to wait out the confrontation, the congregation will need to be committed to heavy expenses for food, lodging, and security arrangements. While initial enthusiasm is very important, it will take a committed, courageous congregation to endure the long-term tedium and costs of sanctuary.

Implications of Offering Sanctuary...

...To the Refugee in Sanctuary

The religious act of sanctuary imposes obligations on the protectors. In addition to providing the refugee with food and shelter, they must give assurance to the refugee in a situation of great uncertainty. If children are involved, serious consideration must be given to their schooling and socialization. Torn from family and culture, the refugee is totally dependent on the charity of strangers: for many, this is the most difficult part of the refugee experience. Attempting to overcome the refugee's insecurity is a challenge to and an obligation of the sanctuary giver. It demands commitment, time, and faith in the human capacity for survival.

The choice of sanctuary is open-ended for those who offer it: the person to be sheltered for an indefinite period of time is unknown, may speak a different language, and hold different values, fears, and hopes. The only certainty is that the refugee will know the pain of separation and will need to be encouraged to rebuild his or her life from ruins. The challenge for the sanctuary giver is to support the refugee in this difficult period.

...To the Sponsoring Religious Community

Members who advocate that sanctuary be given have a special obligation to others in their congregation. Churches that have provided this service find that sanctuary does not come cheap. The sanctuary action demands a steady diet of volunteers and funds over an extended period of time. Operating demands and the collective consequences that sanctuary brings with it can be heavy. Everyone in the congregation needs to be informed and contributing in some way to keep the action faithful, effective, affordable, and cohesive. Sanctuary, by definition, is a collective, public act and therefore must not be decided by a small group for others.

The initiating congregation in turn will need the support of the local community, secular and religious. Keeping denomination representatives at the presbytery, Conference, and national level aware of the action extends the sphere of support and influence. This is an instance where networking can be truly lifesaving.

...To the Canadian Government

The sanctuary giver, as a Canadian citizen or resident, has an obligation to the state either to obey or to confront the law with integrity. For some, sanctuary violates the rule of law and so undermines the concept of justice that we would uphold. Because most Canadians view defiance of constituted authority with distaste, all other options must be thoroughly explored before such a decision is taken. If such action is undertaken, the conviction that the law has failed must be so strong that those involved are willing to pay the price in pursuit of justice.

Discretion is vested in the immigration and law enforcement officers in the prosecution and enforcement of statutes. Confrontation could be avoided by goodwill and negotiation. Mediation and conflict resolution skills may prove most useful.

United Church Polity and Decision to Offer Sanctuary

The polity of The United Church of Canada is set out in *The Manual, The United Church of Canada, 2004*, and one focus is on the processes by which decisions are reached by church courts.

The offering of sanctuary to refugees was not envisioned by the people who shared in the drafting of The Basis of Union, nor the Law and Legislation Committee that developed the bylaws of our polity that form *The Manual*. However, it could be argued that the concerns implicit in "the care of the poor, and the visiting of the sick" (see Section 5.10.1 (6) of the Basis of Union and Section 153 (a) vi.) would place any matter of concern for the dispossessed under the duties of the Session (or equivalent body: Church Board, Section 205, or Church Council, Section 221). Your minister will have a copy of *The Manual*; the Basis of Union of The United Church of Canada is positioned near the front.

A congregation that is considering offering its building as a sanctuary to a refugee needs to give careful thought to the procedures by which it reaches such a decision. Because the decision could have serious legal consequences, it is very important that such a decision is reached following the procedures as set out in *The Manual*. **The failure to follow our own rules has often put a part of our church at a disadvantage in a court of law.** This is why a congregation or pastoral charge *must* have a very clear understanding of its decision-making procedures. There is a tendency in many congregations to follow an informal process in reaching decisions and to leave such decisions to be formalized by the "proper" body after the decision has been reached, and sometimes after it has been implemented. Such informality should be carefully avoided in a matter as serious as the offering of sanctuary.

Decisions concerning the use of the church building are a duty of the Session according to the Basis of Union 5.10.1 (5) and Section 153 (a) v. Therefore, if members of a congregation are advocating that the church building be a place of sanctuary, they must see that this proposal is presented to the Session (or a court of the congregation that has the duties and responsibilities of a Session: Church Board or Church Council) as a motion and that that court makes the decision that the building be offered as a place of sanctuary and recorded in the minutes at the meeting.

A decision by the congregation's court to offer sanctuary may involve extra risk for some members of the congregational community. These include: members of the order of ministry serving the pastoral charge, employees of the pastoral charge, and members of the Board of Trustees. These people need to be in the position of acting out of the official decision of the congregation and should not be put in the position of having to act in anticipation of such decisions. It would seem wise for the Trustees to be directed by the Official Board (or the court having the duties and responsibilities of the Official Board: Church Board or Church Council) to agree with the offering of the building for the use as a sanctuary. (See Section 184 (h) of *The Manual*.) Such official direction may shield a member of the Board of Trustees

from any personal civil liability (although not criminal liability) that persons opposed to this action might attempt to impose.

There is no explicit requirement that an issue such as offering sanctuary requires a decision of the entire congregation, but it would be wise to inform the whole congregation of such a decision and to seek majority support from the congregation.

If a person is at such risk that they require sanctuary, then a decision is needed rapidly. Our polity, as outlined above, involves processes that require some time to complete. This would suggest that congregations should consider this possibility before they are faced with an immediate decision concerning a person in need. The issues of whether the building provides suitable facilities, the willingness of the body that legally must make the decision, and the agreement of other groups within the pastoral charge should be explored before a response to a crisis is required. The Session (or equivalent body) should make a decision in principle and set out clear procedures as to how and by whom that decision is to be implemented.

Financial Implications for Ministry Personnel

The financial implications for ministry personnel—should the declaration of sanctuary be accompanied by legal charges—are by no means clear. A contributing factor is whether the decision to offer sanctuary, and thereby practice civil disobedience, was made in consultation with the congregation. A corporate decision assumes corporate responsibility. Independent action that precipitated congregational involvement puts the actor at greater risk and threatens the pastoral relationship. It is advisable to consult Section 364 of *The Manual*, attached as Appendix IV, page 26.

Appendix I: Sanctuary Cases

A. The U.S. Sanctuary Movement and the Trial in Tucson

In early 1985, U.S. authorities indicted 16 sanctuary workers, charging them with a "criminal conspiracy" aimed at smuggling and sheltering aliens.[6] The target was Rev. John Fife and a religious ministry that was offered by the Southside Presbyterian Church in Tucson. The U.S. government had infiltrated the movement and compiled some 100 hours of tape recordings. Fife insisted that the sanctuary activities were wholly open and that the government was aiming to intimidate the movement and its supporters.

In the fall of 1985, the trial of 11 defendants began. The trial was to last more than six months. The presiding judge (Earl H. Carroll) was determined to keep the focus on the "alien smuggling" charges by ruling out any testimony concerning religious or moral motives, U.S. foreign policy in Central America, or claims under international law. Accused of running an "alien smuggling ring," the defendants admitted that they had indeed assisted in transporting some 2000 Central Americans across the border and then hidden the refugees in churches and homes; but they argued that their actions were justified precisely *because* it was the government that was violating the command of both its treaties and statutes that asylum must be granted to any person having "a well-founded fear" of being persecuted should he/she return to her or his homeland.[7]

On May 1, 1986, the jury's verdict was announced: eight guilty verdicts (including Fife, whose felony conviction carried a maximum punishment of 10 years' imprisonment and a $10,000 fine) and three acquittals.[8] Reverend Fife predicted that this court action would "provide the Sanctuary Movement with more martyrs" and regenerate the movement.

The asylum rejections and the mass deportations of Central Americans during the 1980s had become a major scandal. Support for the Sanctuary Movement was generated by the U.S. government's refusal to recognize El Salvadorans as refugees. The movement had begun by working within the system to change the legislation; only when this approach proved futile did a direct challenge to the legitimacy of the refugee determination system emerge.

In the aftermath of "the Sanctuary Trial," the movement took a new turn.[9] The government was pressured to bring its processes of granting or

[6] Those indicted included a Protestant minister (John M. Fife, Jr.), a Quaker "unbeliever" (Jim Corbett), two Roman Catholic priests, and three nuns; the others were lay church activists. Corbett and Fife are generally considered as the co-founders of the Sanctuary Movement in the Southwest U.S.

[7] This argument introduces the theme of "civil initiative"—an idea developed most fully by Jim Corbett—which, in contrast to "civil disobedience," advances the claim that it is the government that is the law-breaker, not those who are charged with violating these particular unjust laws.

[8] Judge Carroll's sentences, handed down two months later, were mostly on the minimum rather than the maximum side; and all were suspended, with probation conditions that seemed to aim at muzzling these activists.

[9] The U.S. administration continued to reflect the fears that Reagan himself had voiced in 1983: failure to persist in backing right-wing regimes in Central America could well result in "a tidal wave of refugees swarming into our country seeking a safe haven from Communist repression."

denying asylum into line with the law. The so-called "ABC" case (American Baptist Churches v. [Attorney General] Thornburgh), involved a lawsuit brought by a coalition of churches, aimed at compelling the Immigration and Naturalization Service to reshape its procedures so that refugees would be protected rather than deported. The eventual result came in the form of an out-of-court settlement (1990) that granted most of what the churches had demanded and moved the system significantly closer to international human rights standards in the refugee/asylum area. Consequently, it no longer seemed futile to file an asylum application for a Central American refugee. Thus, the sanctuary supporters of the 90s have been moving away from a confrontational stance and toward a broad approach to refugee advocacy and support.

B. Great Britain: The Long Sanctuary of Viraj Mendis

In December 1986, a Sri Lankan by the name of Viraj Mendis entered a church sanctuary in Manchester, England. As a Sinhalese Communist and an "over-stayer" on a student visa who had publicly advocated Tamil rights, his case rested on his presumed vulnerability to harsh retaliation if returned to Sri Lanka. His final appeals for political asylum having been rejected at the highest official levels, Mendis took refuge in the Anglican Church of the Ascension, which was to be his "home" for more than two years. This was a highly public and extremely political sanctuary throughout its duration, with extensive publicity and a nationwide Viraj Mendis Defense Campaign. Finally, on January 18, 1989, as reported in all major British newspapers, in a dawn raid on the church sanctuary, 50 police and immigration officers used sledge hammers and hydraulic equipment to break down the sacristy door and dragged Mendis, in his pajamas, to a waiting police van and a London prison to await deportation to Sri Lanka.

It was the violent expulsion of Mendis that triggered public debate on sanctuary. This event was the first use of forcible entry into a church in modern British history.

In a 1988 "Statement on Sanctuary," the British Council of Churches specified that congregations might consider offering sanctuary to individuals falling into any one of three categories: (1) there is well-founded fear of persecution; (2) there is a serious threat to family life; or (3) gross injustice would ensue.

Observing that sanctuary entails the possibility of criminal prosecution and should not be undertaken lightly, the British Council of Churches offered decision-making guidelines. These include: (1) sanctuary is a "last resort"; (2) the local congregation supports it; (3) it has wide support in the local community with a broadly based defence campaign; and (4) it takes place in a recognized place of worship with the necessary facilities and security arrangements.

A directive warned: "Be careful of using such a dubious device in what may turn out to be an unfortunately chosen individual case." But, in that same year, even the caution that "Refuge in a religious building should only be offered in cases of life and death," was coupled with the assertion that "Viraj Mendis comes into this category."

Discussion of the British Sanctuary Movement is drawn mainly from the writings of Paul Weller, Secretary of the British Council of Churches Community and Race Relations Unit Working Group on Sanctuary. Paul Weller treats the Viraj Mendes case as a prime example of "sanctuary as exposure" or a public sanctuary par excellence. This is to be distinguished from "sanctuary as

concealment," the type of "hidden sanctuary" that likely takes place outside of church premises.

C. Canadian Cases

The 1980s witnessed the Sanctuary Movement in the United States as a symbol of opposition to U.S. refugee policy and practices in the Reagan era and foreign policy in Central America. Among Canadian church people, sympathy was aroused, and cooperative U.S./Canadian programs brought a number of Salvadorans and Guatemalans into Canada (through an "over-ground railroad"), people who would have faced detention and deportation form the United States. None of this involved direct Canadian participation in the U.S. Sanctuary Movement.

Yet, the theme of "church sanctuary" was in the Canadian air. Although there was a reluctance to follow anything but a strictly legal course, tactics pressing the government to "do its duty" were not unknown. The following discussion touches on some of the issues arising when people of conscience and commitment come face to face with decisions on whether or not to provide sanctuary.

The Guatemalans in Montreal

At the end of 1983, some Guatemalans in Montreal were served with deportation notices following the rejection of their applications for refugee status. Seventeen churches supported a demand to stop the deportations and grant the refugees asylum. A young Guatemalan was to be installed in a United Church sanctuary in Beloeil, some 25 miles east of Montreal. In early 1984, public opinion convinced the government to reverse its course. At a press conference called by the church people, preparations for the Beloeil sanctuary were revealed. A temporary moratorium on deportation of Guatemalans was announced by the government, and Guatemala would be added to Canada's roster of "unsafe" countries, effectively suspending any deportations of Guatemalans. The need for a sanctuary and a movement to support it was no longer needed at that particular time.

One of the church people involved in this affair later observed that, "There was a broad enough public opinion [supporting us] and enough openness on the part of the authorities that we could get the Canadian government to protect [the refugees] legally. We were trying to comply with the rules of international law [barring forcible deportation] and Canadian law; and, when there was a contradiction, close the gap."

Canada: Stirrings in the 1990s

Several cases of sanctuary in United Churches have occurred within the past years. One case involved an Asian woman who had entered Canada many years earlier on a visitor's visa to see her son. Her subsequent refugee claim had been rejected, but, according to her son, Canada Immigration had been prepared to allow her to remain on humanitarian and compassionate grounds. However, this offer was withdrawn when it was determined that the mother had cancer. Yet when new medical information indicating that she had been cancer-free for seven to eight years was presented to the Immigration and Refugee Board, she was again rejected.

The woman's lawyer approached the Mission housed in the church premises on the day her client was to be deported; she needed a decision about sanctuary within hours. Because of the urgency and time limits, the congregation was not consulted. The intent had been to inform the congregation the following Sunday, but the refugee's lawyer pressed for as much secrecy as possible for one week, until she was ready to hold a major press conference. Mission staff

complied with that request. They reasoned they were offering the primary support for the refugee who was housed within their facilities.

In hindsight, staff realized it would have been better to consult with the congregation and to have had the Board actively participating in all stages of decision-making. After the fact, we can comment not only on the operational difficulties this posed, but also on the legal difficulties. This independent action put both the staff and property at risk. Decisions taken concerning sanctuary must be presented to the Session or parallel court of the congregation and reflect the collective will of the congregation in accordance with procedures set out in *The Manual*.

In other situations, the congregation has been involved in reaching the decision to offer sanctuary. In one case the minister was contacted late at night on behalf of a rejected Nigerian refugee claimant. The minister immediately contacted the chair of the Board and an emergency Board meeting was held. On the following morning the Nigerian entered church sanctuary. The congregation and the community were involved from the beginning. Potluck suppers were organized, bringing the congregation together with the person in sanctuary. This kind of interaction was very important; it helped to put a human face on the refugee issue for the predominantly middle class congregation. It also may have eased the strain, physical and psychological, on the Nigerian in sanctuary. The authorities waited out the refugee. As the minister put it, "The government was prepared to let him stay until he rotted." After about two months, he left the sanctuary, crossed into the U.S., and went underground.

D. Weighing the Pros and Cons

Over the years, a few congregations have felt the need to declare "sanctuary." Sometimes decisions were based more on the circumstances surrounding the refugee than the claim itself. In 1998, one such decision involved a single mother and her children. The woman had fled El Salvador years before, during the civil war, but in 1998 she and her American and Canadian born children were expected to return to El Salvador. Members of the congregation and community believed the woman's social-economic status had influenced the negative refugee decision and were concerned for the economic and political well-being of the family. Hoping to convince the authorities to allow the family to remain in Canada on compassionate grounds, the congregation sheltered the family for 13 months. The lengthy residency in the church basement took its toll on both the family and the congregation. The congregation's advocacy did convince the province to uphold the children's right to education; as a result, children of failed claimants or "without status" are now allowed to attend public school. However, in the end, the woman and her family had to return to El Salvador.

In 2002, the advocacy of another Montreal United Church secured justice for the individuals involved and protection for refugees generally. On two different occasions, the congregation offered sanctuary to failed refugee claimants who were about to be deported to countries where their safety could not be assured—in direct defiance of international law. The congregation's media-savvy intervention encouraged the Minister of Immigration to intercede, first to give Algerian nationals an opportunity to have their cases reviewed before removal, and in the other case, to declare a moratorium on deportations to Zimbabwe—on each occasion within a few hours of "sanctuary" having been declared. This was ultimate strategic success, whereby confronting the system allowed for its reconciliation with the law.

Appendix II: Legal Considerations

A. International Law: Treaties

The defence counsel can point to binding treaties signed by Canada:

1. The American Declaration of Rights and Duties of Man is an integral part of the Charter of the Organization of American States and imposes human rights obligations on all member States. Article 27 requires, "Every person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements."
2. The International (UN) Covenant on Civil and Political Rights (CCPR), Art. 13, requires three things of Canada:
   - to "ensure" the CCPR rights without discrimination
   - to give effect to the rights
   - to provide an effective remedy

When taken together with the obligations under the OAS Charter, it is clear that this "effective remedy" must be an "effective judicial remedy" so as to protect the individual from acts of authority that may violate his or her rights.

According to the preamble of the CCPR, every individual in Canada is under an obligation to promote and observe these rights. This would include people in a church contemplating sanctuary.

Finally, in accepting the obligations under the Convention Against Torture (CAT), Canada promised not to deport a person to a country where the person would face a serious probability of torture (article 3). This obligation reinforces a similar obligation under the CCPR (article 7).

Canada has been involved in complaints by individuals to the committee of experts elected within the CCPR and CAT for the purpose of receiving reports and complaints. Canada has been found in violation of CAT article 3 (Khan v. Canada) and CCPR article 7 (Ng v. Canada) under legal arrangements comparable with those in effect today.

In 2000, the Inter-American Commission on Human Rights issued a "Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System." The Report followed the Commission's on-site visit to Canada in 1997 to question officials and judges and to hold hearings in three cities and in two jails. In accordance with its mandate, this organ of the OAS interpreted international treaty rights for Canada and gave Canada advice on human rights in refugee procedures. The Commission was particularly concerned about the adequacy of the Canadian procedures and the extent to which they formed an "effective judicial remedy." One particular recommendation by the Commission was for an appeal on the merits for rejected refugee claimants. The possibility of an appeal was put into law, but has not been implemented.

The Commission drew attention to the CAT

article 3—protection from return to a real risk of torture. That right is absolute. The Commission advised Canada that the family had a right to protection and that children enjoyed the right not to be separated from their parents under the Convention on the Rights of the Child (article 9). Separation of close family members in deportation, such as children from parents, would be justifiable only in extreme circumstances.

It follows that an authoritative interpretation of Canada's obligations has been made. That interpretation and advice suggests that the procedures available are inadequate. When this is the case for someone facing deportation, the church member in Canada will be torn between his or her obligation to promote and observe CCPR rights and the obligation to follow the Canadian law.

While it may be argued that the language of these documents supports the giving of sanctuary, the problem is that there is no international court to apply any of it to actual cases. In addition, any international treaty or document that Canada signs is enforceable only when legislation is approved that incorporates their terms into Canadian law.[10] The points noted above have not been translated into Canadian law unambiguously. Since 2002, when it was passed, the Immigration and Refugee Act, article 2(3), requires: "This Act is to be construed and applied in a manner that ...(f) complies with international human rights instruments to which Canada is a signatory." For the first time, it required the Act be interpreted in accordance with Canada's international human rights obligations. It is as yet unclear how the courts will treat this new provision.

B. Possible Defences

The Nuremberg Defence

Stemming from the Nuremberg Trials of Nazi war criminals, it is arguable that a basis was laid for holding individuals as well as states responsible for their actions under international law. This, some have argued, could lead to a claim of "citizen privilege" to break the law in order to preclude that one's action (or inaction) later be judged criminal by an international tribunal. This applies to trying to uphold an international right, as the CCPR itself requires.

The Right to Private Defence

David Matas, Human Rights and Immigration lawyer and former head of the Canadian Council for Refugees, argues that, just as there is a right of self-defence, there is also a right to defend others. Deriving from this would be a duty, under international law, to do what sanctuary workers do. Thus, Matas argues that Canada would be obliged under the Refugee Convention *not* to prosecute those who protect refugees: Canada could be breaking international law if it prosecuted those involved in a sanctuary movement!

The Canadian Charter of Rights and Freedoms

Canada's Charter of Rights and Freedoms guarantees the right to life, liberty, and security of the person, and the right not to be deprived of these rights, except in accordance with the principles of fundamental justice. David Matas here argues the "fundamental injustice" of prosecuting sanctuary workers, given their aim of protecting refugees as commanded by international law. However, this position has not been accepted by Canadian courts.

[10] This latter feature of Canadian law suggests that principles of so-called customary international law—which may be interpreted as passing directly into Canada's law and are applicable without further legislation—may in some cases be of more significance than treaties. Thus, via the norms of customary international law, states may be required—quite aside from the Refugee Convention—to set up refugee determination systems, with due process guarantees, in order to prevent the return of genuine refugees to any place where they might be persecuted.

The Freedom of Religion Defence

What sanctuary workers are doing is directly in line with what they view as their religious duty. To prosecute them for helping refugees would, according to this argument, deprive them of the religious freedom guaranteed by the Canadian Charter of Rights and Freedoms and by international law. This defence is based on the concept of a higher form of justice.[11]

C. Necessity and Sanctuary

(Reproduced with permission from *Sanctuary and Canadian Law*, Inter-Church Coalition for Refugees, 1993. Updated 2003 by Tom Clark.)

The defence of necessity is an answer and defence to any charge that a person has breached the criminal law of Canada. In its simplest terms, it involves the concept that it was *necessary* to break the law in order to avoid greater evil. However, our courts rarely will construe it in this broad a manner. The essence is that one has a choice. For example, a starving man steals a loaf of bread to eat—he could choose to steal or starve to death. A husband breaks the speed limit to take his wife in labour to the hospital. He could choose to break the speed limit or not get his wife to the hospital on time and thereby cause suffering to her and the expected child. In the case of granting sanctuary to persons who would otherwise be removable from Canada and may suffer grievous harm or death upon return to their home countries—there is a choice. It involves allowing the persons to be deported to a country where harm will come to them or protecting them from removal and thereby breaking the immigration and criminal laws.

The choice could be described in this manner: it is the choice of breaking laws in Canada to *protect* a person, or allowing a person to be removed from Canada to certain harm or death. It is tantamount to choosing between protection and allowing them to be shot or tortured on the street in Canada. There is a tendency in our courts to decide that what happens to a person outside of Canada is irrelevant to decisions taken in Canada which might result in removal from Canada. It is important therefore in any kind of defence, even a moral one, that the issue is posed in terms of what the ultimate effect is likely to be from the perspective of remaining in Canada. In *Re Gittens*, a recent decision of the Federal Court Trial Division, Justice Mahoney determined that removal of a young adult who had grown up in Canada back to his home country of Guyana, where he would likely suffer hardship and harm, could not amount to cruel and unusual treatment under the Charter of Rights and Freedoms. Justice Mahoney did not however exclude this as a reason for not removing a person. The Federal Court of Appeal, which is a higher court, however, in the case of an Haitian applicant who argued a similar point, was of the opinion that the Haitian applicant had been dealt with fairly and in accordance with the laws in Canada. Whatever were to happen to him upon his return to Haiti, in the court's opinion, was neither the court's nor the Immigration Commission's business, and so the protection guaranteed under the Charter to have the right to life, liberty, and security of property did not extend to danger in another country.

It is therefore crucial in presenting the issue that the connection to Canada is made in such cases. The above mentioned cases are not on point with respect to this issue, but are only raised in order to show the kind of attitude that our courts have towards removal from Canada and protections offered to persons here.

[11] Much of the material in this section was derived from a legal memorandum prepared by Ed Vandenberg of McGill University Law School.

Recently, the Supreme Court accepted in principle that necessity can justify breach of the criminal code, *R* v. *Ruzic* [2001]. Ruzic claimed that she was forced to try to bring heroin into Canada by a man who threatened to harm her mother, with whom she shared an apartment in Belgrade. The Supreme Court found the defence of necessity in the Criminal Code section 17 too narrow to protect her life, liberty, and security of the person under Charter of Rights and Freedoms section 7. Also, the Common Law rules on duress were also found to permit her action. However, these circumstances are some distance from a sanctuary situation.

Based on the present law, it is not at all clear that a defence of necessity would succeed in the courts as a defence to criminal charges.

D. Possibilities

Although the following possible defences are not strong defences in law, it does not mean that the various aspects should not be raised in a criminal trial. It might be helpful to recall the cases that have come before the criminal courts as a result of the peace movement (e.g. the Berrigan brothers' case). In cases like these, through the use of such defences or the attempts to raise them, the public begins to understand the reasoning and the morality of the cause that led to the charges. There are strong points in favour of trying to raise such defences where someone has been charged criminally for providing sanctuary to a person in danger of removal to his or her country where he or she would come to harm; but the manner in which they are raised is of crucial importance:

(1) It would be important to research the issue of the sanctuary asylum in detail, more so than we have been able to do here. If a legal argument for sanctuary can be constructed by an analysis of the old acts (i.e. the acts of 1623, 1774, and 1972), then it might be raised as an effective defence, even if it is not strong in law, since it is important to uphold the concept of law and order. (If, through press reporting, public opinion is swayed into thinking that the churches have taken the law into their own hands, the morality of the actions taken and therefore the defence in the court are weakened.) By making a case, going back to the 13th century, that the churches have a legal right to take such action, then the action no longer violates law and order—even if it is not a winnable point. (Such action is part of an historical system of law and order that recognizes the role of the churches and the rights of the churches to protect persons in danger. It is based on the concept of a higher form of justice and places the churches in a position which they have held historically as protectors of this higher order—and more importantly, as the legally recognized rightful protectors of this higher order.)

(2) Wherever the need to break the law in Canada is used as an attempt to publicize the danger to the person concerned if he or she should return to his or her homeland, that country's profile is raised, and, even if unacceptable in a court, the overall justice of the cause becomes the issue publicly. It should always be remembered that the Immigration Commission and the Minister are susceptible to public pressure. The raising of public awareness of the political climate of the country to which the person would be deported might not save the accused person from legal sanctions, but could result in a policy not to remove other persons originating from that country. Someone would suffer legal consequences, more than likely if criminal charges have been laid, but the result might be to save a number of people from deportation to a country where they might suffer physical harm and further injustices. It should

also be recognized that the criminal court judges are not immune to the effects of such publicity, and while it is by no means a sure thing, the courts could impose a minimal sanction. Even where a criminal court judge can do nothing to save the accused person from legal sanction, the judge could exercise flexibility in sentencing. As well, where a judge might not be swayed by the morality of the issue, the crown attorney representing the state could be so swayed and ask for a minimal penalty. Both individuals, judge and crown, can be affected by public sympathy in such cases, regardless of their personal feelings, because heavy sentences might have the effect of injuring the image of justice.

(3) The Charter of Rights and Freedoms is new, and there has been much discussed about its protection of the rights and freedoms of individuals in Canada. Use of *Charter* arguments, while they may not be strong in law, assist in establishing the morality of the issue, both in court and publicly. Countering the right to be protected from cruel and unusual treatment with the right of the Immigration Commission to remove someone to a country where there would be danger, raises a real issue: is the *Charter* really a guarantee of such a right if the Immigration Commission can remove someone into a situation where they would come to certain harm? As well, the *Charter* guarantees a right to freedom of expression, thought, and belief, as well as a freedom of conscience and religion. If the defence under the *Charter* can be framed in a manner that emphasizes that the church members involved in protecting someone from removal were sincerely acting according to their conscience and religious beliefs, then the fact that the state is imposing criminal sanctions on them as a result of their deeply held beliefs, again raises the question of how far the *Charter* will go to protect persons. These issues, though not strong arguments to raise in law, are important as to their effect on public opinion.

(4) It is important to recognize that there are two levels in a case where criminal charges are laid as a result of a church offering sanctuary to refugees who have not been recognized as refugees. The first level is the legal level, and it is important that legal defences be prepared meticulously and argued as strongly as possible. We have by no means covered all of the possibilities in such a case. The second level is the public level. This is why the legal defences, even more importantly than in ordinary cases, should be extremely well prepared. We have continually referred to the morality of the issues behind the case. The morality of the issue might (in miraculous cases) swing a court, but it can swing the public mind and have a huge effect on the overall outcome. Therefore, the legal issues have to be raised in the context of the morality of the issue. They must be framed to bring out the justice of the cause with each argument raised. Quite often in court cases evidence is presented or questions raised not so much for the benefit of the judge or jury, but rather for the press, who are always present. The counsel involved must always be prepared with legal arguments to support their right to present such evidence or ask such questions.

Appendix III: Sources for Additional Help

Amnesty International
312 Laurier Avenue East
Ottawa, ON K1N 1H9
Phone: 613-744-7667 or
1-800-AMNESTY
Fax: 613-746-2411
info@amnesty.ca

United Nations High Commissioner for Refugees
Canada Branch
280 Albert Street, Suite 401
Ottawa, ON K1P 5G8
Phone: 613-232 0909
Fax: 613-230 1855
www.unhcr.ch

Human Rights Watch
www.hrw.org

Immigration & Refugee Board (IRB) Documentation Centres
For information on conditions in country of origin that Canada considers, contact

The Ottawa Resource Centre
Research Directorate
Minto Place, Canada Building
344 Slater Street, 11th Floor
Ottawa, ON K1A 0K1
Phone: 613-996 0703
www.irb.gc.ca

IRB Documentation Centres are located in Ottawa, Montreal, Toronto, Calgary and Vancouver.

Appendix IV: Oversight of Ministry Personnel

(Reproduced from *The Manual, The United Church of Canada, 2004*, Section 364)

Charged with a Criminal Offence.

(a) When a person serving as Ministry Personnel is charged with a criminal offence, the Chairperson of the Presbytery, the Chairperson of the Pastoral Relations Committee of the Presbytery (or any other Committee fulfilling that function), and the Secretary of the Presbytery:
   i. shall make a Decision as to what is the responsible local body, which in the case of a Pastoral Charge shall be the Official Board or Church Board or Church Council;
   ii. shall consult with that responsible local body after consultation with the Official Board or Church Board or Church Council of the Pastoral Charge or employing body (or other bodies that they consider to be appropriate);
   iii. shall consult with the person charged;
   iv. shall then make a Decision whether it would be inappropriate for the person to continue to function as Ministry Personnel pending the final disposition of the matter; and
   v. shall give notice of this Decision in accordance with section 003 to the person, the Official Board or Church Board or Church Council or employing body, the responsible local body, and the Presbytery.

(b) Should the Decision be that further ministry would be inappropriate, the person shall immediately refrain from functioning as Ministry Personnel.

(c) At any time prior to or as soon as practicable after the final disposition of the criminal charge, the Presbytery, after consultation with the appropriate Conference staff person and after obtaining legal advice from or through the General Council office, shall:
   i. proceed with the disposition of a complaint made against the person under section 072;
   ii. make a complaint against the person under section 072;
   iii. initiate a Formal Hearing under section 075 into the fitness of the person for ministry;
   iv. proceed under subsection 363(d); or
   v. make a Decision that it is appropriate for the person to resume functioning as Ministry Personnel.