PLEASE READ - DISCLAIMER: This statement does not constitute legal advice, but only contains general information about Canadian law with respect to offering sanctuary to refugees. If you are considering offering sanctuary or requesting sanctuary, you should seek the advice of **a lawyer who is familiar with this area of law**.

This document has been reviewed and endorsed by Peter Showler, former Director of the *Refugee Forum*, University of Ottawa, former Chair of the Immigration and Refugee Board, and Executive member of CARL, Canadian Association of Refugee Lawyers

The legal implications of offering sanctuary

"Sanctuary" is the act of offering a safe place for a refugee who is facing deportation. Religious communities may offer their place of worship as a temporary shelter for a refused refugee in order to protect that person from deportation to a dangerous situation.

I. MORAL FOUNDATION: Sanctuary as enforcing Canada's legal obligations

Canada has both a domestic and international legal obligation to protect refugees. The sanctuary movement believes in acts of "civil initiative" to hold Canada accountable to these obligations and to protect refugees from being unfairly treated by our refugee determination system. In doing so, we are seeking to uphold Canada's legal obligations, rather than disobey them. (For more on the concept of "civil initiative," see **Appendix "A"**.)

Domestically, the *Immigration and Refugee Protection Act* ("*IRPA*") governs Canada's treatment of those who claim refugee status in Canada. Section 3(3) of *IRPA* requires that *IRPA* be applied in a manner that complies with the Canadian Charter of Rights and Freedoms and international human rights instruments signed by Canada, such as the United Nations 1951 Convention Relating to the Status of Refugees (PDF).

The current government has failed to respect these obligations in two ways: by changing *IRPA* to curtail refugee rights, and by enforcing *IRPA* in inconsistent and arbitrary ways.

Legislative amendments introduced in 2012 (read the amendments here) made sweeping changes to *IRPA* that made it more difficult for refugee claimants to prove their claims in a fair and reasonable manner. These changes severely compromise the ability of refugees to obtain protection in Canada. The Canadian Sanctuary Network is concerned about the potential for miscarriages of justice that could put lives at risk.

There are several reasons for this concern, including the imposition of extremely tight timelines to prove refugee claims, the mandatory detention of Designated Foreign Nationals ("DFNs"), exceptionally harsh treatment for people from Designated Countries of Origin ("DCOs"), the denial of appeal rights for several categories of claimants and finally, the denial of a pre-removal risk application ("PRRA") for one year. The PRRA was a final risk assessment that considered new evidence of risk before a valid refugee was sent home to a risk of persecution. Now, despite the existence of new evidence to

show risk in some cases, a PRRA will not be conducted if less than 12 months have passed since the claim was refused by the Immigration and Refugee Board.

Many organizations have expressed concern about the constitutionality of the amendments, including the Canadian Civil Liberties Union, the Canadian Bar Association (PDF), and the Canadian Association of Refugee Lawyers.

As amended, the new act (known as the *Protecting Canada's Immigration System Act*) violates the 1951 Refugee Convention (PDF) (the "Convention"). Article 3 of the Convention prohibits discrimination against a refugee based on their country of origin, and Article 31 prohibits imposing a penalty on a refugee claimant based on how he or she arrived in Canada. The new "Designated Country of Origin" and "Designated Foreign National" provisions violate these articles.

Below are some of the Canadian Sanctuary Network's primary concerns with this new legislation and how it has made it more difficult for refugee claimants to prove that they face a risk of persecution in their home countries.

a) Tight timelines

Former System	**New System**
28 days to submit Personal Information Form ("PIF")	15 days to submit Basis of Claim ("BOC")
Refugee hearing average wait: 19 – 21 months	Refugee hearing within 60 days * Claimants from Designated Countries of origin ("DCOs") must have their refugee hearing 30 days after they submit their BOC. *
Automatic access to a Pre Removal Risk assessment ("PRRA")	No PRRA for 12 months post-RPD No PRRA for 36 months for individuals from "Designated Countries of Origin" ("DCOs")
Access to Humanitarian and Compassionate ("H & C") application	No H & C for 12 months, with two limited exceptions A five-year bar on applying for an H&C **after a negative refugee claim or PRRA** for people found to be Designated Foreign Nationals ("DFNs")

* The accelerated timeline for refugee hearings increases the risk of error because there is insufficient time for claimants:

- to retain legal counsel
- to prepare the written Basis of Claim ("BOC") and other new forms
- to obtain evidence from their country to support their claim

- to undergo medical/psychological evaluation to support their claim
- to recover from trauma to be able to tell their story

b) No right to appeal to the Refugee Appeal Division

Many arguments that justified the need for sanctuary in the past relied on the fact that Canada did not have a proper appeal mechanism for failed refugees. The lack of an appeal "on the merits" or, as of right, was viewed as a flaw in the Canadian system. Now, the Refugee Appeal Division ("RAD") has been implemented, but certain claimants are denied access to it. This includes claimants from Designated Countries of Origin ("DCOs") and other categories of claimants, such as Designated Foreign Nationals ("DFNs") and those who entered Canada from the U.S. as an exception to the Safe Third Country Agreement.

Claimants from Designated Countries of Origin ("DCOs") with poor human rights records, such as Mexico and Hungary, have no access to the RAD. Several Federal Court judges have been critical of some Refugee Board Members' treatment of human rights violations in these "DCO" countries. The Court routinely finds that Board members make errors and ignore the very real dangers in those countries. Claimants from DCOs can now be removed from Canada without the chance to have these errors reviewed at Federal Court.

See **Appendix "B"** for recent comments from Federal Court judges about the Immigration and Refugee Board's dismissive treatment of refugees from DCOs.

c) Tight timelines at the RAD

Even those refused claimants who can appeal face a very tight timeline (within 30 days) which may make it impossible for them to get the help they need to file an effective appeal. It is very difficult to appeal without a lawyer and cutbacks in several provincial legal aid schemes will effectively deny refused claimants a genuine opportunity to make an effective appeal.

d) Lack of statutory stay on removal

Refused claimants with no access to the RAD also have limited access to the Federal Court, which is their last chance to prevent removal. They may apply to the court for leave to judicially review their rejection by the IRB, but there is no automatic stay of their removal order. This means that unless they can find a lawyer who is willing to apply to the Court for an emergency motion to stay their removal, and unless the court is inclined to grant the stay before they have seen the detailed arguments, failed claimants will be facing immediate removal from Canada. Again, given the work involved in bringing a motion to Federal Court and cutbacks to funding for legal assistance, meritorious cases will go unchallenged and lives will be endangered.

e) One-year bar on Pre-Removal Risk Assessment

Refused claimants can be removed from Canada without access to a pre-removal risk assessment ("PRRA") until 12 months after their negative refugee decision (36 months for those from DCOs). There may be changes in personal circumstances and country conditions that occur within those 12 months that put individuals at grave risk of harm that will not be considered prior to their removal. The longer timeline for DCOs is unjustified and heightens the vulnerability of some claimants from these countries.

Additional concerns: Arbitrary decision making at the Refugee Board

Even before these legislative changes, some refugee claimants have always slipped through the cracks of Canada's refugee determination system. Our system is not perfect, and if a claimant has weak legal representation, poorly translated documents, or an unreceptive Board Member, the claimant may be mistakenly denied refugee status. After receiving a negative decision, a removal order may be issued and the claimant may be deported before having the opportunity to make any other applications.

According to research by Osgoode Hall Law School professor Sean Rehaag, the success rate of a refugee application largely depends on which member of the Immigration and Refugee Board is hearing their case (view Rehaag's statistics here, and his article, "Troubling Patterns in Canadian Refugee Adjudication" here [PDF]). Rehaag later expanded his research to the Federal Court, with similar results: certain judges had remarkably low numbers of positive decisions when deciding administrative appeals of immigration decisions (read his PDF article - "Judicial Review of Refugee Determinations – The Luck of the Draw?).

This arbitrariness runs contrary to s. 7 of the Canadian *Charter of Rights and Freedoms*, which requires that any procedure that could result in the deprivation of a person's life, liberty or security of the person must conform to the principles of fundamental justice. When an arbitrary process results in the deportation of a person to a real risk of persecution, it violates Canada's obligation of "*non-refoulement*" under Article 33 of the 1951 Refugee Convention (PDF). This article prohibits deporting a refugee to a country "where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

The *Charter of Rights and Freedoms* is part of Canada's Constitution, and the 1951 *Convention on the Rights of Refugees* is a treaty that Canada undertook to abide by in good faith. Through acts of "civil initiative," the sanctuary movement is holding Canada accountable to these fundamental obligations as they relate to the rights of refugees.

II. LEGAL IMPLICATIONS: Organizations offering sanctuary

The following section explores the concerns of organizations considering offering sanctuary, including whether law enforcement officials will enter a place or worship, or whether offering sanctuary will affect an organization's charitable status.

a) Entry into religious building

To date, the Canada Border Services Agency ("CBSA") has not entered a church or other religious building to arrest a person in sanctuary.

On two occasions, however, a person in sanctuary has been arrested by local police. In 2004, an Algerian man was arrested while in sanctuary in the basement of a Quebec City church. He had been arrested in Montreal for his participation in a political demonstration, and was granted bail on the condition that he did not leave Montreal. He went into sanctuary in Quebec City, where he was arrested under a criminal warrant for breaching his bail conditions. The fact that there was a criminal warrant in his case is significant – to date, authorities have not arrested anyone in sanctuary who has only an immigration warrant. Local police handed him over to immigration officials and he was deported. He achieved refugee status in the U.S. and returned to Canada as a permanent resident in 2009.

In 2007, an Iranian national was arrested in a Vancouver church basement after he called the local police to complain that he was receiving harassing phone calls. The police arrived at the church to investigate, and arrested him when they discovered that he did not have status in Canada (his immigration warrant came up when they did a search). It is noteworthy, here, that this man contacted police himself, and that the authorities would not otherwise have approached the church to violate sanctuary. While awaiting deportation, he received a positive decision on his humanitarian and compassionate application, and subsequently received permanent resident status in Canada.

Citizenship and Immigration Canada (CIC) has published a detailed policy statement on when CBSA will enter a place of worship (read the full policy here - PDF). To capture the tone of this policy, we have reproduced the relevant section in full below:

> Procedure: Sanctuary in places of worship
>
> The CBSA uses a case-by-case approach based on the particular facts and circumstances of each case. Entering places of worship under Special Entry Warrants to enforce removal orders should be reserved for cases involving security threats (e.g. terrorism, espionage), serious criminality (e.g. murderers) and exceptional circumstances. Exceptional circumstances may include cases where there are strong public calls for enforcement action; or any other case where based on the discretion of the CBSA officials involved, enforcement action is deemed necessary to protect program integrity (e.g. wide-spread abuse of sanctuary), public safety, and national security. In

making those discretionary decisions, CBSA officials will always give consideration to the degree of sensitivity for these cases, as well as public and officer safety. Strategic guidance by Inland Enforcement Directorate will be critical in making such determinations.

Given the sensitive nature of these cases, a case-by-case approach will allow CBSA officials the necessary flexibility to deal with each situation as it arises. Furthermore, it will allow the CBSA to meet its statutory obligations by reserving the right to enter places of worship when security threats and/or exceptional circumstances are involved, while not dictating a pre-determined response when dealing with media sensitive cases that may attract negative publicity. This flexibility will also allow the CBSA to use Special Entry Warrants in lower priority cases (e.g. failed refugee claimant) in the event the number of sanctuary cases rise significantly.

Regional Inland Enforcement officers must notify CIC Case Management of all sanctuary cases as they arise. Additionally, Regional Managers must consult with the Inland Enforcement Directorate before entering a place of worship to enforce removal orders.

The frequency of sanctuary cases will be closely monitored in order to track the prevalence of sanctuary cases. If there is evidence of widespread abuse of sanctuary, then forced entry operations for traditionally lower priority removals (e.g. failed refugee claimants) cases may also be necessary to maintain the integrity of the system.
In conjunction with CIC, the CBSA continue to create a dialogue with places of worship that are currently providing sanctuary to encourage feasible solutions for current cases and help discourage these places of worship from accepting individuals in the future.

Creating a dialogue with places of worship that stresses the importance of upholding the integrity of the immigration system will assist in preventing a rise in future sanctuary cases.

Overall, it appears that CBSA is most concerned about negative publicity if their officers were to enter a church to forcibly remove a person in sanctuary. To date, this has acted as a sufficient deterrent to prevent CBSA from entering a place of worship.

In one interesting case (Zhao v. Canada – click here to read) in 2001, the government acknowledged its practice of not entering churches to violate sanctuary. In this case, a permanent resident, not a refugee,who had been convicted of a serious offence was scheduled to be deported. She took up residence in a church, and filed an application to reopen an appeal of her deportation. The government argued that the motion to reopen should be postponed until she came out of the church, since the government would not currently enforce her deportation order. According to the government's argument, “the Crown does not enter churches and forcibly remove those who seek refuge there. To do so... would be to violate the sanctity of a place of worship” (see paragraph 1 of decision).

b) No prosecutions of religious organizations

To our knowledge, no church or other religious organization has ever been charged or convicted for offering sanctuary to a failed refugee claimant. Broadly defined offences do exist that could theoretically be applied to those offering sanctuary: sections 124 to 131 of the *Immigration and Refugee Protection Act* refer to the offence of assisting someone to violate the *IRPA*. The penalty for this offence could include a fine of either $50,000 and a prison term of up to two years (section 125) which was recently amended to increase the penalty to up to $100,000 and a prison term of 5 years (section 128), the

difference depending on whether a charge proceeds by indictment or by summary conviction. (click here to see the relevant sections of *IRPA*). However, to our knowledge these provisions have never been used against those who provide sanctuary.

In addition, it has often been the practice that individuals in sanctuary, their legal advocate, and/or the faith community that offers them sanctuary, have disclosed to CBSA that the person was seeking sanctuary as well as the exact location of the church of congregation property. Such a disclosure makes clear that there is no intention to physically impede CBSA from entering the sanctuary. It is arguable, in these circumstances, that those providing sanctuary have not in fact assisted in the breach of *IRPA* as a result of this disclosure. Note, however, that disclosing the location could result in enforcement action although CBSA has not done so to date.

In 2013 a similar type of offence was struck down by the British Columbia Supreme Court (read the case here) because it was overbroad, and therefore unconstitutional. Section 117 of the *IRPA* prohibits helping someone to arrive in Canada "illegally," or without proper documentation. While this section was designed to prevent criminal human smuggling activities, it was struck down because it could be used to prosecute humanitarian groups, family members, and others who are helping refugees to escape persecution. In its written submissions before the court, the Crown stated that religious organizations are not considered migrant smugglers when they enable migrants to stay for humanitarian purposes and for no financial or material gain (see paragraph 89 of the decision).

The 2013 decision was a positive development in the area of humanitarian assistance to refugees and, potentially, to the sanctuary movement. However, the decision was overturned by the British Columbia Court of Appeal, (read the case here). In granting the appeal, the Court permitted the Crown to "significantly recast" its argument by overhauling what it submitted was the actual objective of s.117, which it now characterized as being to "prevent individuals from arranging the unlawful entry of others into Canada, thereby securing the secondary goals of enforcing Canadian sovereignty; maintaining the integrity of Canada's immigration and refugee regime; protecting the health, safety, and security of Canadians; and promoting international justice and security" (see paragraph 5 of the decision). By accepting that Canada had a broader objective than adhering to international obligations in mind when it enacted s.117, the Court then concluded that the section was in keeping with this objective and was not, therefore, unconstitutionally overbroad. There is hope yet, as leave to appeal this latest decision is being sought to the Supreme Court of Canada.

c) Charitable status of a religious organization

To our knowledge, no religious organization's charitable status has been revoked because it has offered sanctuary.

In order to retain its charitable status, a religious organization must devote at least 90% of its resources to its charitable purpose. For most religious organizations and faith groups, helping people in need, welcoming the stranger, love of neighbour, respect for human dignity and life, and service of others, are integral components of their faith and important ways of advancing their faith. Offering sanctuary is an expression of these long-standing religious principles and practices and therefore furthers the charitable purpose of a religious organization.

According to the CRA's policy on political activity, simply providing shelter to a refugee facing deportation is not, without further action, a political act. Even if a religious organization should go further and issue a call to political action, such as a letter writing campaign to public officials, registered charities are allowed to conduct "political activities" provided that they are non-partisan, connected and subordinate to the charity's purposes, and constitute 10% or less of the charity's activities (read the CRA's policy on political activity here).

A charity's status may be revoked if it engages in activities that are illegal or contrary to public policy. It is very uncommon for an organization's charitable status to be challenged because of illegal activity, and to our knowledge, no case has arisen where offering sanctuary was challenged as illegal. In a case where a charity's status was challenged as "contrary to public policy," (read the case here) the Federal Court of Appeal held that there must be a "definite and somehow officially declared and implemented policy" that the charity was violating. In the case of sanctuary, there is no known public policy that outlaws the practice.

Any challenge to a religious group's charitable status on the grounds of offering sanctuary would likely be a very significant case, and would invoke the group's *Charter*-protected freedom of religion and conscience. As it stands, we are not aware of any precedent for a religious organization's charitable status being revoked or even threatened because of the group's decision to offer sanctuary.

III. LEGAL IMPLICATIONS: Individuals in sanctuary

Going into sanctuary does not generally have a negative impact on the legal case of the failed refugee. In fact, most of the cases of people in sanctuary over the past thirty years have been quietly resolved so that the refugee could leave sanctuary with a secure status.

If a failed refugee has chosen to go "underground" (or to avoid a deportation date and live without reporting to CBSA), the Federal Court may be less receptive to any applications made by this person to stay in Canada. The Court may see the person as having "unclean hands," because he or she has disobeyed the law by remaining in Canada. There are many factors that the court considers in such a determination. By going into sanctuary, and by disclosing this to the authorities, there is a lower risk that a refugee will be seen as having "unclean hands" because he or she has not chosen to go "underground".

In several cases, judges from the Federal Court have explicitly spoken about the virtues of sanctuary. It should be noted that this does not mean the Federal Court as a whole endorses the practice of sanctuary.

In one case in 2011 (Damte v. Canada – read the case here), a failed refugee claimant in sanctuary went before the Federal Court twice to challenge a negative decision on her Humanitarian and Compassionate ("H & C") application. The first time, the court overturned the first negative H & C decision without mentioning the fact that she was in sanctuary. When the court ordered reconsideration of her H & C, which was also refused, she sought relief at Federal Court again. In this decision, the judge went out of his way to reproach the immigration officer who made the H & C decision for their comments on sanctuary. The judge stated that the officer "missed the point" by criticizing the church instead of seeing that the church provided sanctuary "out of humanitarian and compassionate concern for [the claimant's] well-being" (see paragraph 32 of decision).

In a case before the Immigration Appeal Division in 2000, the Board expressed respect for the practice of sanctuary. In attempting to deport a family living in sanctuary, the government argued that the enforcement system would become meaningless if everyone sought to evade enforcement of immigration decisions by staying in church basements. The Board rejected this argument, and recognized that the family was in a "desperate situation", then implied that the applicants' case was stronger because they had been offered sanctuary:

> One can imagine that not all persons trying to evade deportation would evoke such sympathy and support from a church, and one can only assume that Church leaders in this country would reserve their church basements for only those most deserving of sympathy. (See paragraph 25, *Bahsous v. Canada*, [2000] I.A.D.D. No. 1876 – unavailable on CanLii.)

While there is no formal policy on how the courts and immigration tribunals will treat those in sanctuary, there is no clear precedent for sanctuary harming a failed refugee claimant's prospects of staying in Canada.

IV. CONCLUSION

The result of changes to the refugee determination system, including accelerated timelines, restricted access to appeal, and the elimination of pre-removal risk assessments for most claimants will expose many refugees to serious violations of their human rights. There will be a greater need for sanctuary to ensure that certain failed claimants will not be sent back to face persecution, in violation of Canada's *Charter of Rights and Freedoms* and our international human rights obligations.

Appendix "A": The meaning of civil initiative

"Civil initiative" is the attempt to stop unfair treatment by holding the government to its legal obligations. This concept is an alternative to "civil disobedience," which is the attempt to protest unfair laws by violating the law.

In the context of sanctuary, "civil initiative" means offering sanctuary to refugees who deserve protection under the *1951 Refugee Convention* and the Canadian *Charter*.

The concept of civil initiative has been adopted by the majority of groups offering or facilitating sanctuary in Canada. In a special edition of the journal *Refuge* on sanctuary (Vol. 26, No. 1, Spring 2009, read the issue here), author Michael Creal summarized a consultation on sanctuary that took place in Toronto, Ontario. The issue of "civil initiative" was important to the discussion, and most participants thought of offering sanctuary as "a civil initiative that called upon the government to honour its commitments to the protection of refugees, specified in *IRPA*, and to various international instruments—like the *Convention Against Torture* — that the government had signed on to. Seen in this light, congregations offering sanctuary were upholding the law, not breaking it" (p. 72).

Civil initiative is a concept that took hold during the U.S. sanctuary movement in the 1980s. At the time, large numbers of refugees from Central America fled civil violence in their home countries and arrived in the U.S., where they were treated as illegal immigrants and deported. To protest this treatment, a group of churches in Arizona offered sanctuary to these refugees. (For more on this movement, see "Sanctuary: A story of American conscience and law in collision," by Ann Crittenden, published by General Publishing Company in 1988. This resource is available on request to the Sanctuary Network.)

Jim Corbett, a leader of this Arizona group, has described this sanctuary movement as a "civil initiative." According to Corbett, the churches were exercising a legal duty to protect refugees from having their rights violated at the hands of the government.

Jim Corbett has written extensively on the sanctuary movement and the concept of civil initiative. The following quotations are taken from his pamphlet "The Sanctuary Church," published in 1986 by Pendle Hill. (This resource is available on request to the Sanctuary Network.)

According to Corbett, civil initiative seeks to *uphold* the law, while civil disobedience seeks to *defy* the law. These two strategies of change are quite different, and should not be confused: "Many of the strategies in civil disobedience that have been devised to topple unjust laws are counterproductive when they guide our exercise of civil initiative to protect good laws; they undercut the very statutes and treaties we wish to protect" (pp. 18-19).

Corbett also describes civil initiative as a peaceful movement that is based on the applicability of international law to all state actors: “Civil initiative that incorporates recognized rights into community norms and legal practice is peacemaking in its quintessential form... As the inauguration in practice of formally declared and ratified human rights, civil initiative is designed to claim and incorporate these disputed frontier territories of codified law into our country's accepted social standards” (p. 18).

In the context of sanctuary, Corbett writes that the necessary laws to protect refugees have already been passed, and so refugee protection is no longer a “dispute frontier.” As a result, “[s]anctuary for Central American refugees defends good laws that U.S. government officials are violating... the legislation we need has already been passed. In the face of massive disobedience by federal administrators, the sanctuary church is complying with our country's refugee laws” (p. 19).

Appendix "B": Comments from the Federal Court about the Refugee Board's treatment of claimants from DCOs

In a recent decision concerning violence against a Roma claimant from Hungary, Justice O'Keefe stated:

> It is not clear from the Board's reasons or from the record why the UN Rapporteur's findings that violence had gotten worse was rejected in favour of a determination that conditions had improved. The fact that the Board referred to the increase in violence as a submission of the applicant's counsel, instead of originating in the Rapporteur's report, compounds this lack of transparency, as it is not clear whether the underlying document was properly considered.

See *Horvath* (click here) at para. 47

Similarly, decisions of two failed Mexican refugee claims met similar criticism from the Federal court, where Justice Russell, who allowed both applications, states:

> All in all, there was cogent evidence before the Board that the police in Mexico are corrupt and have extensive involvement with kidnapping gangs, that human rights commissions are ineffective, and that government initiatives to deal with the problem have largely failed. All of this is highly relevant to the issue of why the Principal Applicant did not go to the police.
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See *Sanchez* (click here) at paras. 85 - 86

> Rather than deal with the immediate threat faced by the Applicant, the Board confined itself to the usual formulations about the presumption of state protection and the fact that Mexico is a democracy. As cases in this Court have shown, Mexico's ability to protect its own citizens is not invariably accepted. Much depends upon the facts and the evidence adduced in each case. In the present case, in my view, the Board did not engage with the primary issue, which was the immediate threat faced by the Applicant. In the face of such an immediate and deadly threat, I do not think that accessing alternative institutions was a reasonable possibility.

See *Barajas* (click here) at para. 68