

# **Sanctuary for refugees?**

*A guide for congregations*

Sanctuary for Refugees? A Guide for Congregations © 05/97  
Revised and Updated in June 2003  
The United Church of Canada  
Justice, Global, and Ecumenical Relations  
3250 Bloor Street West  
Toronto, ON M8X 2Y4  
ISBN# 0-88622-350-4

**Acknowledgements**

Charles Stastny and Gabrielle Tyrnauer - researchers and writers  
Grant Bracewell - observations on United Church polity  
Inter-Church Committee for Refugees - thanks to ICCR for inclusion of their study

# Table of Contents

|  |           |
|--|-----------|
| <b>The Experience of Offering Sanctuary, A Personal Reflection</b> | <b>5</b>  |
| <i>Introduction</i>  | <b>6</b>  |
| <b>What is Sanctuary?</b>  | <b>6</b>  |
| <b>Sanctuary for Refugees</b>                                      | <b>6</b>  |
| <b>Why this Resource?</b>  | <b>6</b>  |
| <i>The Heritage of Sanctuary</i>                                   | <b>7</b>  |
| <b>Ancient, Medieval and Modern Roots</b>                          | <b>7</b>  |
| <b>Canada as Sanctuary?</b>  | <b>7</b>  |
| <i>Canada's Refugee Determination System in Brief</i>              | <b>9</b>  |
| <b>Key Terms for People Considering Sanctuary</b>                  | <b>9</b>  |
| <b>Canada and the Asylum Seekers of the 1980s</b>                  | <b>9</b>  |
| <b>Canada and Asylum Seekers in the 1990s</b>                      | <b>10</b> |
| <i>Sanctuary and the Law</i>                                       | <b>11</b> |
| <b>Offences Related to Providing Sanctuary</b>                     | <b>11</b> |
| <i>Sanctuary in Action</i>   | <b>12</b> |
| <b>Considering the Case</b>  | <b>12</b> |
| <b>How Canada's Refugee Determination System Works</b>             | <b>13</b> |
| Standards for Eligibility  | 13        |
| Process  | 13        |
| Administrative Reviews   | 14        |
| Political Intervention   | 15        |
| Legal Limbo  | 15        |
| <i>The Congregational Decision</i>                                 | <b>16</b> |
| <b>What Can a Congregational Do?</b>                               | <b>16</b> |
| <b>Considerations for the Congregation</b>                         | <b>16</b> |
| <b>Implications of Offering Sanctuary:</b>                         | <b>17</b> |
| To the refugee in sanctuary  | 17        |
| To the sponsoring religious community                              | 17        |
| To the Canadian government   | 17        |
| <i>United Church Polity and Decisions to Offer Sanctuary</i>       | <b>18</b> |
| <b>Financial Implications for Ministry Personnel</b>               | <b>19</b> |
| <i>Appendix I: Sanctuary Cases</i>                                 | <b>20</b> |
| <b>A. The US Sanctuary Movement and the Trial in Tucson</b>        | <b>20</b> |

|   |           |
|---|-----------|
| <b>B. Great Britain: The Long Sanctuary of Viraj Mendis</b>                                     | <b>21</b> |
| <b>C. Canadian Cases</b>  | <b>22</b> |
| The Guatemalans in Montreal   | 22        |
| Canada, Stirrings in the 1990s  | 22        |
| Weighing the Pros and Cons  | 23        |
| <b><i>Appendix II: Legal Considerations</i></b>   | <b>24</b> |
| <b>A. International Law: Treaties</b>   | <b>24</b> |
| <b>B. Possible Defences</b>   | <b>24</b> |
| The Nuremberg Defence   | 24        |
| The Right to Private Defence  | 24        |
| The Canadian Charter of Rights and Freedoms   | 24        |
| The Freedom of Religion Defence   | 25        |
| <b>C. Necessity and Sanctuary</b>   | <b>25</b> |
| Possibilities   | 26        |
| <b>D. An ICCR Perspective on International Treaties</b>   | <b>28</b> |
| <b><i>Appendix III: Sources of Further Help</i></b>   | <b>29</b> |
| Amnesty International   | 29        |
| United Nations High Commission for Refugees - Canada Branch                                     | 29        |
| Human Rights Watch  | 29        |
| Immigration & Refugee Board (IRB) Documentation Centres   | 29        |
| <b><i>Appendix IV: Oversight of Ministry Personnel (Reproduced from The Manual, 36 (b))</i></b> | <b>30</b> |

## **The Experience of Offering Sanctuary, A Personal Reflection**

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 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 trans-formation.

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 in-fighting 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 landing. 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 repatriation 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 ... ”.<sup>1</sup>

## Why this Resource?

The intent of this booklet is to provide information for congregations facing a request for sanctuary. Fundamentally, the choice for sanctuary belongs to the congregation and must be an informed decision, as well as a decision of faith. Even decisions of faith can benefit by everyone knowing the implications of their actions, as much as possible, before setting out to consider their options. This resource will help explain the process, but does not replace spiritual and legal counsel for the congregation or the refugee.

### We will sketch here, in brief:

1. How sanctuary is beginning to enter the Canadian scene
2. The centuries-old roots of sanctuary
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.

---

<sup>1</sup>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 Judaeo-Christian tradition provides the basis for the reintroduction of this institution in North America and Europe. "Sanctuary" began with God's directive to Moses to establish "six cities for refuge for the people of Israel, and for the stranger and for the sojourner among them, that any one who kills any person without intent may flee there". Based on this distinction, these refuges 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, the "law of ecclesiastical sanctuary" reflected the church/state struggle, in effect creating a dual system of law. 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 species 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, it lasted until the 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 meant 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 19th century, the typical candidate for political asylum was a European leader of a defeated nationalist movement. In the latter half of the 19<sup>th</sup> century and the 20th century, however, the candidates were groups discriminated against by national (ethnic) identity, religion, "race", etc<sup>2</sup>. Refugees now were coming en masse. But, since refugees' protection is subordinate to national policy, many among them were labeled "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 into the world at a time when the pre-modern form of sanctuary (as "internal asylum") had almost disappeared. Yet, in the European imagination, the whole New World was seen as a sanctuary, far from the religious and political oppression of the Old World. The assumption was that the door would be open to all those who needed a safe haven.

---

<sup>2</sup> Examples of this modern form of "sanctuary" would be 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, more recently, 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.

In the late eighteenth century, the American Revolution divided the continent between the new United States and what was to become Canada and created the first American refugees or “Loyalists”.<sup>3</sup>

Two later episodes 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, more than a century later, U.S. war resisters of the Vietnam War escaped to Canada. In both these cases Canada became the terminus of an “underground railroad”. Canadian acceptance of both groups was rather mixed; yet there was no real thought of forcible return. Following the end of the wars, some 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*.<sup>4</sup>

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, and 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 the stream of Vietnamese (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.

Canada Immigration policy favours the resettlement of refugees selected abroad according to immigration criteria. In the 1980s, however, more refugees began choosing Canada. Plane, boat, and bus loads of "asylum seekers" showed up on our borders. By late 1986, administrative measures were introduced to deter spontaneous arrivals and tighten borders. The pressure to restrict admissions led to an exaggeration of the numbers of abusers in the system and a rejection of some genuine refugees. 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 good will and invited a call for sanctuary. In the past there has been a generally cooperative relationship between the government and non-governmental organizations; church sanctuary, an intrinsically confrontational course of action, would challenge that relationship.

---

<sup>3</sup> 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.

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

# Canada's Refugee Determination System in Brief

Here we are concerned only with the fundamentals, the definitions of basic terms, the key historical terms in Canada's asylum legislation and policy, and the essential legal framework and administrative processes as applied to those seeking refugee status.

## Key Terms for People Considering Sanctuary

**Refugee:** a person forced to flee from his/her home in search of refuge elsewhere. A "Convention Refugee" defined by the 1951 UN Convention on Refugees (as supplemented by the 1967 Protocol to this treaty), is a person, *outside his (her) country*, who has a "well-founded fear of persecution because of race, religion, nationality, membership in a particular social group, or political opinions".<sup>5</sup> Canada, a party both to the Convention and the Protocol, has written these terms into statute law.

**Right of asylum:** by virtue of its membership in the Organization of American States, Canada has agreed to grant the right of asylum under Article XXVII of the American Declaration of the Rights of Man. "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." Most importantly, there is the prohibition (Art. 33 of the Protocol) of *refoulement* of refugees, i.e., forced return of a refugee to a persecuting and life threatening place.

**Asylum seekers:** those who appear at entry points and request asylum. These "spontaneous arrivals" chose Canada, rather than Canada choosing them at overseas locations. Together with defectors, overstayers (visitors, students, etc.), they comprise the pool of applicants for refugee status and are known as refugee claimants.

**Refugee determination system:** the procedures leading to the granting or denial of refugee status. In Canada, obtaining this status opens the way to permanent residence and then citizenship. Following a denial, a failed claimant has 15 days to seek leave from the Federal Court or 30 days to leave the country before a removal order is placed upon them. A very few failed claimants, who have new evidence of risk on their return or compelling humanitarian and compassionate grounds for remaining, may have the slim possibility of gaining a legal status for remaining. But, when all channels have been exhausted, they face deportation from Canada.

## Canada and the Asylum Seekers of the 1980s

In the post Second World War era, Canada was seen as one of the more generous countries towards the world's refugees. Meantime, technology made Canada increasingly accessible, giving rise to what bureaucrats dubbed "irregular movements" of uninvited asylum seekers. 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 Tamils arrived on the East Coast of Canada, fears were fed

---

<sup>5</sup>This definition has been criticized as excessively narrow, since it leaves out "internal refugees" (displaced persons in their own country), who are much more numerous than Convention Refugees; and it excludes people whose forced migration is due to war, famine, etc. The Organization of African Unity (OAU), a regional organization, has adopted a broader definition more pertinent to Third World nations.

that hordes 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. The legislative outcome, implemented in 1989, included both an elaborate refugee determination system (C55—Chapter 36, 1988), and the Refugee Deterrents and Detention Act (C84—Chapter 35, 1988).

## **Canada and Asylum Seekers in the 1990s**

Bill C86—Chapter 49, 1992, which went into effect in early 1993 streamlined the process. The "screening" hearing, which had been carried out for a time at border stations, was dropped. Under this new act, senior immigration officers acquired the authority to disqualify direct arrivals from so-called safe third countries and turn them back at once. In practice, these officials continued to allow the "walk-ins", with few exceptions, make their applications and enter Canada. However, prior to the implementation of Canada's "safe third country agreement" with the US, "direct backs" did occur for a period in 2003. Implementation of this Memorandum of Understanding with the US will affect the "safe third country" provisions enacted in C-55 and C-86.

For those refugees who do avoid the various interdiction measures and enter Canada, it does not follow that the final outcome of their applications will be favourable. When the C-55 procedures went into effect (1989), the percentage of acceptances were high, even though the Refugee Board (IRB) in its basic decision-making, followed the narrow "Convention refugee" definition. In subsequent years the percentage declined considerably, and by the time C-86 came into effect the acceptance rate was 57%.

The Immigration & Refugee Protection Act (June 2002) reduced the IRB Panel that hears refugee claims to a single judge and, as a counter-balance, introduced an appeal (not yet implemented). Other review procedures, the Pre Removal Risk Assessment (PRRA) and the "Humanitarian and Compassionate" review were also enabled, but, in practice, offer very limited safeguard.

Negative decisions and the consequent removal orders can put some refugees in danger. It is no surprise, therefore, that some 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. The following section of this manual will focus on the legal considerations of sanctuary.

## Sanctuary and the Law

Those who offer sanctuary must realize that they are breaking the law. A refugee applicant who has lost her or his case and seeks to avoid removal commits an illegal act; *assisting* a refugee in that act of avoiding removal (offering church sanctuary) is also illegal.

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, as is their right, the congregation must be prepared for the consequences. Discretion is vested in the immigration and law enforcement officers in the prosecution and enforcement of statutes.

### Offences Related to Providing Sanctuary

The Canadian Immigration 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, perhaps the most serious, the 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 Act—for example, encouraging or counseling someone to refuse to comply with a removal order—is up to two years imprisonment or a fine of \$5,000, or both. Where an additional offence of "conspiracy" is committed, the penalty could be doubled.

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

# Sanctuary in Action

## Considering the Case

A congregation or individual faced with 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, find out 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 for addresses.) Find out whether the country has a history of gross and systematic human rights violations and tolerates the persecution of a minority (religious, ethno-cultural, linguistic, etc.) Country Reports are also available through regional Documentation Centres of the Immigration and Refugee Board.

Not all failed claimants warrant sanctuary nor will they benefit from it. Other forms of support and counseling may be more appropriate. A rash decision to offer sanctuary can irrevocably damage the credibility of the church.

### Questions to consider...

1. Has the individual exhausted all administrative and legal provisions available in the refugee determination process?
2. Are there compelling compassionate or humanitarian reasons for the individual to remain in Canada? (H&C)
3. Would the individual be at risk on return to the country of origin? Risk can be physical or psychological; victims of torture are not to be returned to the country of torture. (PRRA)
4. Has this person been denied human justice within Canada or according to international laws?
5. Can the case and the individual withstand the scrutiny and the stress of long-term sanctuary?
6. Is there any history of criminality or terrorism?

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 be involved, but congregation-wide conversation is advisable. Sanctuary is a desperate measure, demanding serious consideration and thought; a careless decision made for frivolous reasons 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.”

That definition fits the political reality in which it was conceived. It has definite 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. Refugee claimants must fit the narrow Geneva Convention definition and base their claim on one of the five categories.

### Process

#### *Exclusion*

Canada, like other western countries, has introduced measures (visas, carrier fees, flight screening, exclusion) to contain “irregular” movements of people. Such interdiction measures do not distinguish between refugees and migrants and can violate an individual's right to seek asylum.

Since 1994 anyone indicted for a criminal offence and liable to a 10 year sentence cannot put forward a refugee claim. In the fall of 2001, new security measures that denied ‘any person deemed a possible security risk’ access to Canada's refugee determination system were introduced. An applicant cannot contest the charge; grounds for the security-risk rating may be tenuous but are not shared. Unfortunately, “criminality” and “security risk” can be highly politicized categories in many world areas.

Canada turns away refugee applicants who have a history of serious criminality, who are viewed as a security threat or who have been recognized as a Convention Refugee by another country, who have had a refugee claim heard before by the IRB, or who have abandoned a previous refugee claim. In the near future, refugee applicants arriving from the US (where it is considered they could make a claim) will be turned back at the border. In 2002, Canada signed a Safe Third Country Agreement with the US. When the Agreement comes into force, only immediate family members of Canadian residents or citizens and minors will be allowed to cross the border to make an asylum claim.

#### *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 to apply for determination of refugee or protected person status 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 his/her hearing. Some straight forward (manifestly well-founded) claims may be expedited without a hearing; normally, a single decision maker determines the refugee claim. Approximately 57 percent 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 a person in need of protection (from persecution or torture) and eligible to apply for “landing”.

However, some individuals could be prohibited from landing 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 (\$500.00) can be met, a Convention Refugee can apply for “landing” or permanent residency for him/herself and immediate family members.

### ***Review of the Decision***

An individual who receives a negative decision or is determined not to be a refugee or a protected person has few options. The Immigration & Refugee Protection Act (July 2003) introduced the Refugee Appeal Division but an appeal process has yet to be implemented. 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 returned to the IRB for a re-hearing. If “leave” is denied, rejected 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 Citizenship and Immigration Canada (CIC) for a Pre-Removal Risk Assessment. This administrative review is to protect individuals who are *not* Convention Refugees but who may yet be at risk of persecution, torture or cruel and unusual punishment if repatriated. Only new evidence will be considered. Pending the filing of the PRRA, an applicant’s removal order is stayed until after the 15 day deadline for submission passes and/or the application is refused or abandoned.

If the risk assessment is positive most applicants will be allowed to apply for permanent residency. If an individual is inadmissible for reasons of security or serious criminality, or was denied access to the refugee determination process, a positive determination will result in a “temporary stay of removal”.

If a negative decision is received, the applicant must comply with his or her original removal order. CIC will make removal arrangements.

#### ***Humanitarian and Compassionate Review***

Rejected claimants can apply to Citizenship and Immigration Canada for a Humanitarian and Compassionate Review 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 per child) for an H&C.

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 court.

### **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 Act, the Minister of Citizenship and Immigration can exercise his or her discretion to allow a person to stay in Canada as a landed immigrant.

### **Legal Limbo**

People who have had their claims rejected, are in possession of removal orders, having had no reconsideration of the rejected claim, may be allowed to remain in Canada indefinitely. There are countries to which no removals, except of criminals, are made owing to widespread human rights violation or generalized violence in those countries (e.g., Algiers and Zimbabwe in 2002). The rejected claimant's removal order stands ready to be implemented, however, upon improvement in the country situation.

# The Congregational Decision

## What Can a Congregational Do?

When you have compiled the information about the case and the immigration process, you will need to consider the consequences of the decision 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. Sanctuary is never the only option. Sometimes, it is necessary to help people prepare to return home.

If the man or woman 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 positive result, at least in the short term, is unlikely. Sanctuary is an open-ended invitation; resolution could take weeks, months, years.

Can the claimants 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 repatriation.

In some cases the most appropriate action for the church should be to support some of the refused refugees with counseling and assistance in preparation for the return home. Other cases may actually 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 repatriate the refugee. If 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 the facilities and the fellowship. Should the authorities decide to wait out the confrontation, the congregation is committed to heavy expenses for food, lodging and security arrangements during the stand-off. While initial enthusiasm is very important, it will take a committed, courageous congregation to endure the long term tedium and costs of sanctuary without complaint.

## **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. 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, have 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 and ashes. 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 done this find that sanctuary does not come cheap. The sanctuary action demands a steady diet of volunteers and funds over the long haul. 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 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 truly be 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 it is undertaken, the conviction that the law has failed must be strong so 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 good will and negotiation. Mediation and conflict resolution skills may prove most useful.

# United Church Polity and Decisions to Offer Sanctuary

The polity of The United Church of Canada is set out in *The Manual* 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 which forms *The Manual*. However, it could be argued that the concerns implicit in "the care of the poor, and visiting the sick," see basis 5.10.1 (6) and section 153 (a) vi. (1 = Section from now on) would place any matter of concern for the dispossessed under the duties of the Session (or equivalent body: Church Board } 205 or Church Council, } 221. )

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 later such decisions may 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 Basic 5.10.1. (5) and } 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) and that that court makes the decision that the building be offered as sanctuary.

A decision by the congregation's court to offer sanctuary may involve extra risk for some members of the congregational community. These are: members of the order of ministry serving the pastoral charge, employees of the pastoral charge and members of the Board of Trustees. These people all need to be able 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, ie: Church Board or Church Council) to agree with the offering of the building for the use as a sanctuary } 184 (h). 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 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 an actual 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.

Citations are to *The Manual* 1995 Edition

## **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 363 (b) of *The Manual*, attached as Appendix IV.

# Appendix I: Sanctuary Cases

## A. The US Sanctuary Movement and the Trial in Tucson

In early 1985, U.S. authorities indicted sixteen sanctuary workers, charging them with a "criminal conspiracy" aimed at smuggling and sheltering aliens.<sup>6</sup> 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 clandestine 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 eleven defendants began, which was to last more than six months. The presiding judge (Earl H. Carroll), was determined to keep the focus strictly 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.<sup>7</sup>

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.<sup>8</sup> 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.

---

<sup>6</sup> 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.

<sup>7</sup> 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.

<sup>8</sup> 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.

In the aftermath of the "Sanctuary Trial", the movement took a new turn.<sup>9</sup> The government was pressured to bring its processes of granting or 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 INS 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 nation-wide Viraj Mendis Defense Campaign. Finally, on January 18, 1989, as reported in all major British newspapers, in a dawn raid on Mendis' church sanctuary fifty police and immigration officers used sledge hammers and hydraulic equipment to break down the sacristy door, and dragged Mendis, in his pyjamas, 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 persons 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 lightly undertaken, 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."

---

<sup>9</sup>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."

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, 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"), who otherwise would have faced detention and deportation from the United States. Still, none of this involved direct Canadian participation in the U.S. Sanctuary Movement. [See Appendix I. for brief accounts of the contemporary U.S. and British movements.]

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; 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 had been made superfluous.

One of the church people deeply 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 repatriations] 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 in question 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 7-8 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 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*.

Other congregations have 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 2 months he left the sanctuary, crossed into the U.S., and went underground.

### **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 years ago during the civil war, but now 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 and declare moratoriums on deportations, first to Algiers and later to Zimbabwe - on each occasion within a few hours of Sanctuary having been declared. This was ultimate strategic success, whereby confronting the system actually allowed for its reconciliation with the law.

# Appendix II: Legal Considerations

## A. International Law: Treaties

The defence counsel can point to three documents signed by Canada: (1) the Universal Declaration of Human Rights (Art. 14: "Everyone has the right to seek and to enjoy in other countries asylum from persecution"); (2) the Convention on Civil and Political Rights (Art. 13 requires that aliens lawfully in the territory of a [signatory] state not be arbitrarily expelled); and, finally, (3) the Refugee Convention and later Protocol Article 33 forbids the forced return *refoulement* of a refugee to a place "where his life or freedom would be threatened on account of his race, etc...." 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.<sup>10</sup> The three points noted above have not been translated into Canadian law.

## 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.

### 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-defense, 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.

---

<sup>6</sup> 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.<sup>11</sup>

## C. Necessity and Sanctuary

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

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 be 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 a 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 basically none of the court's or 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 be 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

---

<sup>11</sup> Much of the material in this section was derived from a legal memorandum prepared by Ed Vandenberg of McGill University Law School.

the kind of attitude that our courts have towards removal from Canada and protections offered to persons here.

With respect to the defence of necessity, the closest case that employed the principle that is really at issue here—that of a third party claiming necessity in order to protect another person who is really in danger of some evil—is that of the Morgentaler case in Quebec (1975). He raised the necessity of performing abortions in order to protect the mother from grave danger. He was acquitted by two juries but convicted on appeal. He is now raising the same defence in conjunction with the Charter of Rights and Freedoms arguments in the charges that he is presently facing in Toronto. Should he be successful in the present case then there would be a stronger case for arguing necessity in future sanctuary cases.

Based on the present law, however, it is our opinion that the defence of necessity would ultimately stand little chance of success in the courts as a defence to criminal charges.

### **Possibilities**

Although these defences are not strong ones in law, it does not mean that the various aspects cannot be raised in a criminal trial. It is similar to the cases that have come before the criminal courts as a result of the peace movement (e.g. the Berrigan brothers' case). In these the public arena is perhaps the more important one, in that through the use of the 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 being laid. There are a number of very strong points in favour of trying to raise such defences in a court if 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 it would be raised is of crucial importance. Some of the things that come to mind are:

i) It would be important to research the issue of the sanctuary asylum in detail, more so than we have been able to do here, because in our opinion it is pivotal. If there is any legal defence that can be constructed by an analysis of the actual old acts (i.e., the 1623, 1774, and 1972 acts) then it should be raised as a defence even if it is not strong in law. There is a concept of law and order which needs to be upheld and if the public opinion through press reporting is that the churches have taken the law into their own hands, this weakens the morality of the actions taken and therefore of the defence in the court. However, if it is possible to at least make an arguable case, which goes back in history to the 13th century, that the churches have a legal right to take such action as offering protection to persons in danger, then it no longer violates 'law and order' even if it is not a winnable point, as it is part of an historical system of 'law and order' which recognizes the role of the churches and the rights of the churches to protect persons in danger. It is really based on the concept of a higher form of justice, in the eyes of God, and puts the churches in the place which they held historically, as protectors of this higher order, and more importantly, as the legally recognized rightful protectors of this higher order.

ii) If 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, the country profile is raised considerably and, as a result, even if not acceptable in a court, publicly the overall justice of the cause becomes the issue. It should always be remembered that the Immigration Commission and the Minister are particularly susceptible to public pressure. The result of raising in a criminal trial the background 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 persons from that particular country. Someone would suffer legal consequences, likely if criminal charges were laid, but the result might be to save a lot of persons from deportation back to the country. 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. This is why the morality of the issue is so important, because if a criminal court judge accepts it and can do nothing to save the accused person from sanction which must be imposed, the judge could exercise a flexibility in sentencing. As well, even where a judge would not agree with the morality of the issue, the crown attorney representing the state could be so swayed and ask for a minimal penalty. Both of these individuals, judge and crown, could be affected by sympathetic publicity in such a case, regardless of their personal feelings, because heavy sentences might have the effect of injuring the image of justice.

iii) The *Charter of Rights and Freedoms* is new and there has been much publicity about its protection of the rights and freedoms of persons in Canada. Use of *Charter* arguments, while they may not again be strong in law, assist in establishing the morality of the issue, both in the court and publicly. Counter proposing 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 just 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, and as well a freedom of conscience and religion. Again, 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 on 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 are valid ones, though not strong ones to raise in law, but more importantly ones which are publicly important.

iv) 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 one, and it is important that legal defences be prepared meticulously and be argued as strongly as possible. We have by no means covered all of the possibilities in such a case, as it is really a mammoth task and would take much longer to research properly. The second level is the public one. 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 can not only (in miraculous cases) swing a court, 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 people who are always present. The counsel involved however must always be prepared with legal arguments to support their right to present such evidence or ask such questions. The questions and evidence of this nature always go to justifying their positions. The lawyer representing the policy is probably the best of all counsel at doing this whose whole purpose appears to be to publicly justify prior actions in the investigation. It is effective, for the press invariably pick up the point in their coverage of the case.

## **D. An ICCR Perspective on International Treaties**

Canada has ratified a number of international human rights treaties, notably the Covenant on Civil and Political Rights (CCPR) and the Convention against Torture (CAT). These should have special significance in Canadian law because all provinces, as well as the federal government, agreed on their ratification. By now, it is clear that these treaties set limits on deportation when torture or irrevocable breakdown of family life would be a consequence. Unfortunately, there are increasing signs that Canadian law is out of line with international obligations. In 1994, the UN Human Rights Committee determined that Canada's expulsion of Mr. Ngo to the U.S. had been a violation of the CCPR even though the Supreme Court of Canada has foreseen no problem with the expulsion. In 1995, the UN Committee against Torture found that Canada's proposed expulsion of Mr. Khan would violate the CAT even though Mr. Khan had enjoyed the benefits of the Canadian appeal. The 1996 Report of the Special Rapporteur against Torture notes that Canada expelled a woman refugee claimant back to Zaire against the express wishes of the UN Special Rapporteur, claiming she had enjoyed the benefits of the Canadian appeal procedures. And problems have been recognized inside Canada. The report commissioned by the government, *The Quality of Mercy* by Susan Davis and Lorne Waldman, released in April 1994, revealed serious problems such as inadequate criteria, lack of independence of decision-makers, and no obligation to give reasons for decisions. The range of proposed reforms has not yet been fully implemented. Given this evidence, there are reasonable grounds for questioning the results of Canadian procedures. The situation poses problems for Canadians and church people.

The CCPR, a treaty supported by all members of the Canadian federation, accepts that an "individual" in Canada "is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant." Yet the treaty human rights are not fully recognized in Canadian law in the manner they have been internationally determined to apply in expulsion. And if Canadian courts have failed to apply treaty obligations, it is unlikely they would apply customary international law. The Canadian who does his or her duty under the CCPR would prevent a refugee claimant from being expelled when the consequence is a real risk of torture. The Canadian would prevent the deportation of a family member when the consequence is that the family unit could not be re-assembled in another country. Yet current Canadian law would be unlikely to recognize this. And a pronouncement of "violation" from the UN Human Rights Committee after several years of proceedings might be cold comfort for the Canadian.

## **Appendix III: Sources of Further 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](mailto:info@amnesty.ca)

### **United Nations High Commission for Refugees - Canada Branch**

280 Albert Street, Suite 401  
Ottawa, ON K1P 5G8  
Phone: (613) 232 0909  
Fax: (613) 230 1855  
[www.unhcr.ch](http://www.unhcr.ch)

### **Human Rights Watch**

[www.hrw.org](http://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, 11<sup>th</sup> Floor  
Ottawa, ON K1A 0K1  
Phone: (613) 996 0703

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

Visit the IRB website at [www.irb.gc.ca](http://www.irb.gc.ca)

## Appendix IV: Oversight of Ministry Personnel

~~(Reproduced from *The Manual*, 363 (b))~~ **To be replaced with new version**

~~It shall be the duty of the Presbytery to oversee the conduct of all Ministry Personnel on its roll (including members of the Order of Ministry (Basis 6.4.16) and all those under Presbytery appointment.)~~

~~When a person serving as Ministry Personnel is charged with a criminal offence:~~

~~i. the Chairperson of the Presbytery, the Chairperson of the pastoral Relations Committee of the Presbytery (or any other Committee that is fulfilling that function), and the Secretary of the Presbytery:~~

~~(1) 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;~~

~~(2) shall consult with the 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);~~

~~(3) shall make a Decision whether it would be inappropriate for the person to continue to function pending the final disposition of the matter. This Decision shall be sent by registered mail to the person, the Official Board or Church Board or Church Council or employing body, the responsible local body, and the Presbytery. Should the decision be that it would be inappropriate, the person shall immediately refrain from exercising the functions of ordained or diaconal ministry;~~

~~ii. the Pastoral Relation Committee of the Presbytery shall, on request from such person or from the responsible local body, consult with the person and the responsible local body as to legal assistance for such person and the person's immediate family;~~

~~iii. if the person serving as Ministry Personnel resides in a province where legal aid is in existence and such person is entitled to legal aid, then advantage shall be taken of such legal aid. If no legal aid is available for such person, then the Presbytery may make an application to the Executive or Sub-Executive of the General Council of the United Church, therewith;~~

~~iv. if the responsible local body is unable to give financial assistance to such person, by way of maintenance to such person and the person's Immediate Family pending final disposition of the matter, then the Presbytery may make an application to the Executive or Sub-Executive of the General Council of the United Church, with recommendations therewith;~~

~~v. when a person is suspended from the exercise of the functions of ordained or diaconal ministry as required by the Decision referred to in paragraph i. above, then, if there is no conviction of the person, the person may thereafter resume exercising the functions of ordained or diaconal ministry..~~

~~vi. when final disposition of the criminal offence result in the conviction of the person, the Presbytery shall have the power to make the decision:~~

~~(1) whether or not the person shall refrain from exercising the functions of ordained or diaconal ministry, or~~

~~(2) that the pastoral relationship be dissolved or the appointment terminated.~~