



*True North In Canadian Public Policy*

# Straight Talk

Jan. 2013

## Scott Newark on immigration and national security

*This is the third instalment in a dedicated six-part series of the Macdonald-Laurier Institute's Straight Talk on the subject of immigration and national security with nationally-recognized expert Scott Newark. This instalment explores how, and how well, the Canadian government checks people out before letting them in as immigrants or as refugees.*

**MLI:** What is screening of immigrants really designed to do? Is it to detect people who are serious or career criminals and to catch people who are inadmissible on security grounds? The latter being people who are not known to have committed a terrorist crime, but have a pattern of associations that just makes them sinister?

**Newark:** Actually there are a number of grounds for inadmissibility. In addition to people currently wanted by the authorities in other countries, or who have been convicted of certain serious crimes elsewhere, and those who pose security threats, we try to keep out those we think are human rights violators, are involved in organized crime, have serious health problems that would make them a burden on the public purse, or for other reasons would be dependent on public assistance.



**Scott Newark's** 30-year criminal justice career began as an Alberta Crown Prosecutor, with subsequent roles as Executive Officer of the Canadian Police Association, Vice Chair and Special Counsel for the Ontario Office for Victims of Crime, and as a security and policy advisor to both the Ontario and federal Ministers of Public Safety.

There's also misrepresentation, an underutilized ground for refusing admission in my view. Consider the security certificate cases where the government is trying to remove certain persons through a supposedly "expedited" process because of the perceived threat they pose to our security. Several of these people came into Canada using phony documents or false stories which is misrepresentation. Instead of going through the difficult process of proving terrorism links (without revealing sources), we should be able to just prove deception at entry which is far easier. That presumes, however, that removal from Canada would be a relatively quick process upon proof of inadmissibility, which is anything but the case today. In other words, both screening and enforcements are required to make the improvements required. The bottom line is that the various screening mechanisms we have are supposed get enough relevant information about people seeking to enter our country so that we don't let people who are ineligible on any of these grounds. As history shows, once the bad guys are here, it's very difficult to get them out, so getting the screening right is essential.

**MLI:** So how does screening work?

**Newark:** We supposedly check existing databases of relevant information to see if people are who they claim they are or if because of their past conduct they shouldn't be allowed into Canada. This is everything from Interpol databases of arrest warrants and stolen passports to US criminal fugitive lists to international terrorism watch-lists to organized crime databases to our immigration removals databases and much, much more. There's not much doubt that the information is out there; it's how well or how poorly we are retrieving, organizing, and then using it. In my view we are not even close to doing this as well as we should and that's what needs to change. Having said that, there have been several recent reforms enacted by the Government which are definite improvements. These include changes brought about by C-45 where we will now require an Electronic Travel Authorization for persons from non-visa countries which should include inadmissibility checks. The same Bill authorizes the long overdue pre-departure receipt of information by Canada Border Services Agency (CBSA) about persons departing for Canada so they can be checked before the plane departs. As we've discussed previously, C-31 created biometric screening for persons seeking entry via a temporary resident permit to Canada from designated non visa countries, 30 of which were announced by Minister Kenney in December 2012.

On security grounds, the inadmissibility language in the Immigration and Refugee Protection Act or IRPA was written a decade ago and it is not simply convictions or warrants for terrorism offences, but includes membership, association, or participation in groups recognized as posing a terrorist risk. Section 34 (1a) speaks of "*Engaging in an act of espionage or an act of subversion against a democratic government.*" In my view, the legal definition of security inadmissibility needs modernization to deal with the sorts of associations and activities that create a potential risk to our security.

**MLI:** I assume there are two main kinds of people trying to get into Canada. (1) The immigrant who has made a formal, orderly application and doesn't come here until it's been processed and approved; and (2) the refugee who arrives here with improper documents or none at all, then says 'I admit I bypassed normal screening but I was in desperate danger, and here's who I really am and can I please stay in Canada?'

**Newark:** It's more complicated than that because there are also people who come here supposedly temporarily and then once they're in Canada claim refugee status. And, when it comes to refugees, we're trying hard to screen them before they arrive through a formalized process that includes international cooperation and the United Nations.

Unfortunately another growing category of people trying to get into Canada are those who employ "human traffickers" to help them deliberately avoid the screening process, to show up and overwhelm the system

because it's expensive, legally difficult, and bad publicity to intern them while you do exactly the same screening you'd have done before letting them arrive in an orderly way. The Government has begun to deal with this through C-31 which creates a series of procedural disincentives for persons that choose the people smuggling route over our screening process.

**MLI:** How does the Safe Third Country process work? I mean, if you're fleeing persecution, you can't file a visa application saying "I am trying to escape before they kill me" then wait until it's processed. How do those people, assuming they don't get a smuggler to help them bypass the system, try to come to Canada as a refugee?

**Newark:** First, there is actually a global United Nations' sponsored process to get approved, which checks people out once they've reached somewhere safe and say 'yes' this person is a legitimate refugee. We take a number of people that way. There is also a process where you try to be sponsored by third party groups. And again in both cases there are screening mechanisms tailored specifically to the person that wants to claim refugee status.

The best model, in my opinion, is right in our own backyard. For years, the greatest number of refugee claimants entered Canada from ...the United States of America. They weren't Americans, though. They were transiting through (or fleeing from) the US to come to Canada. What they were really saying is they *preferred* to be a refugee in Canada rather than in the United States. That's why we negotiated the Safe Third Country Agreement with the US, which came into effect after 9/11. With a couple of exceptions it said if somebody comes from the US into Canada and claims refugee status they will be sent back to the US where they can claim refugee status or apply to come to Canada as an immigrant because they are not at risk of persecution in the US. The same approach applies in reverse.

This was in the news a while back when Immigration Minister Jason Kenney started requiring visas for visitors from Mexico. We were getting a lot of people coming to Canada from Mexico via the US then claiming refugee status. Under the Safe Third Country Agreement that should have resulted in a return to the US but because the legislation exempted people coming from countries where we didn't require visas, such as Mexico, the Minister prevented the abuse by requiring visas. Fixing the legislation is a better long term solution in my view. Part of that is now in force as a result of C-11 where the Minister can designate countries that are presumptively 'safe' which has a consequence of expediting the refugee determination and appeal process. Although, in my view, we still need to fix the details of the Safe Third Country Agreement with the US and extend it to other countries, what's been done is a huge improvement. In December, Minister Kenney released the initial group of 27 presumptively safe countries which includes the EU and the US so we're definitely on our way notwithstanding the howls of outrage from the Immigration lawyers who can see their gravy train has just taken a hit.

**MLI:** OK, that covers our southern border. What about other sources of refugees?

**Newark:** We need to pursue such arrangements much more aggressively with the rest of the world, including the European Union. This is not just theoretical. Ahmad Ressam, the would-be 'Millennium Bomber', was living in France before he decided to come to Canada and claim refugee status. While I might not want to live in France, it's beyond a stretch to think he qualified as being at risk of harm by being there. He just decided he wanted to come to Canada and knew the best way to jump the queue was to claim refugee status. Some of the highest profile security-based removal cases underway also involve people who came to Canada from blatantly 'safe' countries. Surely it makes sense for us to say you are not at risk if you are coming from France or any similar democratic country with the rule of law and respect for rights, so return there and seek refugee asylum or get in line to make an immigration claim to come to Canada like everyone else. A good example of this is the recent arrests of a human smuggling ring of Romas who came from the EU, flew to Mexico, snuck into the US and then entered Canada illegally at the Quebec border. These people clearly could have made their claims in

any number of EU countries to which they could travel or Mexico or the US but they choose to do so in Canada. Significantly, the Government has used their new powers under C-31 to declare these people ‘irregular arrivals’ which trigger the procedural changes as well.

I should add that tolerating these systemic abuses is a bad practice generally, but in security relevant cases its potentially dangerous.

**MLI:** What about people like the Tamils on the Sun Sea who come here directly?

**Newark:** Actually a lot of them didn’t. They’d already reached Thailand from Sri Lanka via India. And while they may not have wanted to live there for the rest of their lives, they were not at the kind of risk they claimed they had been while in Sri Lanka. So we need to extend those Safe Third World Agreements to countries with whom we already have agreements like Australia, New Zealand, the UK, the EU, and others. The Canadian government is also working, and Australia is trying to do the exactly the same thing, to extend this system internationally so we are able to deal with people before they arrive on our shores.

**MLI:** Suppose for some reason somebody legitimately flees directly to Canada. He gets off of an airplane in Ottawa and says, ‘Listen, I am from Saudi Arabia, I am gay and if they would have known they would have killed me. I stole my cousin’s passport and got on a plane and here I am. I’m telling you up front I’m not the guy it says on this passport, but I lied to save my life and can I please stay?’ Does that count as misrepresentation that makes him ineligible, or because he immediately declared what he done, is he then allowed to stay in Canada? If so, what do we do while we try and figure out if his story is true?

**Newark:** Release him.

**MLI:** Just release him?

**Newark:** Yes, in 99.9 percent of the cases assuming our initial screening doesn’t reveal disqualifying inadmissibility grounds or an arrest warrant although even then people are routinely released to enter Canada and pursue their claim. As soon as someone utters what insiders refer to as “the ‘R’ word” —refugee – they are released on a temporary residence permit into Canada while they make a refugee claim. We investigate their background, they are brought in, interviewed, and everything else. Ultimately, it will go in front of the Immigration and Refugee Board who will make a determination on the validity of the refugee claim. And all the appeals we discussed before apply as well, of all different kinds.

**MLI:** If I’m a would-be immigrant following the rules, by the time I am allowed to get on a plane to Canada have I been properly checked out?

**Newark:** Over the last decade we’ve really started doing that better. Even if you’re from a country where we don’t require a visa, you have to present a passport or some kind of travel document that theoretically is matched to databases to see who you actually are. As we’ve discussed, the Government has also enacted significant screening improvements in defined circumstances under C-31 and C-45. Legislative reform is necessary but we also have to support it with operational modernization as well such as deploying a face recognition biometric bad guy look out system at points of departure and ports of entry. This is so because forged and phoney documents are increasingly more sophisticated and a lot of bad guys aren’t dumb enough to apply for entry themselves or while using their right name. Still, we’re doing a better job of front-end screening. The first thing we do is check to make sure they are not somebody who has been deported from Canada before, somebody with criminal convictions that would make them inadmissible, somebody with health concerns that would make them inadmissible, and so on.

**MLI:** How do we find that out? Do we go to Mexican authorities and say “We have a Jose Gonzalez, born March 15, 1971 and what do you know about him?”

**Newark:** Generally, yes. And a lot of the onus on that is put on the immigrants themselves to supply the information, but our visa issuing offices and Citizenship and Immigration Canada are meant to check that the individuals qualify and are not inadmissible. A better, targeted lookout system as we discussed earlier would obviously help as would technology to ensure the guy getting on the plane or walking up to the primary inspection booth is who his documents say he is.

**MLI:** If they are coming from a country where we think the record keeping is liable to be insufficient like say Afghanistan, what do we do?

**Newark:** For the majority of people who are coming here from Afghanistan, I suspect we are not relying so much on Afghan officials as on our own information. The lack of reliability of information in some places is a reality that cuts both ways.

**MLI:** Now let’s talk about improvements. When it comes to investigating immigration applications before people get here, or when someone is standing in front of an immigration officer making a refugee claim, what concrete steps should take in order to make sure that we let in more of the people we want and fewer of the ones we don’t?

**Newark:** We should definitely modernize some of the inadmissibility criteria. We will discuss some of the technical details later in this series, but modernizing the criteria of security-based inadmissibility to reflect the current threats is a definite priority in my view. This is required for a variety of other issues as well because, in my view, the Immigration and Refugee Protection Act is one of the worst drafted pieces of legislation in place and lack of clarity leads to systemic dysfunction. Fortunately, clarifying the process through legislative and operational reforms appears to be a Government priority.

Secondly, when it comes to a “bad guy look out system”, we should use modern face recognition biometric technology so we know, for example, if somebody shows up at the border driving from Ogdensburg, NY if that guy is wanted by the police for murder in Pennsylvania. We’re currently doing a less than effective job keeping out people we already kicked out of the country for criminality. There are numerous examples of non-citizens deported for crime who repeatedly re-enter Canada only to get caught committing new crimes. The traditional excuse from CBSA was that, believe it or not, they can’t do very much because the bad guys have really good documents. If you are using face recognition biometrics, checking him against a high-quality photo taken by the police or Correctional Services of Canada, we can match him no matter how good his documents are. As I noted, my understanding is that CBSA is now in the process of modernizing their lookout system. We’ll need to examine the operational details of any such reforms however to see if they’re actually meaningful or not.

**MLI:** So, should we have these at every border crossing?

**Newark:** Yes and, in fact, the 2006 Conservative election platform committed to doing just that. They haven’t yet, but they are moving toward it with an agreement covering the US, the UK, Australia, and New Zealand. This is also a key part of the new Canada-US Border Agreement and C-31 specifically authorizes taking of biometrics for screening so we are definitely making progress.

We also need to better co-ordinate multiple databases. Umar Abdulmutallab, the “underwear bomber” who tried to blow up Northwest Flight 253 from Amsterdam to Detroit in 2009, is a good example of a failed database system. Name-based databases are an anachronism; today we can do much better screening.

In 2005, when I helped with the border security analysis for the front line border officers union, I decided to check and see how effective CBSA’s “lookout” system was for terrorism fugitives. I used five guys on the FBI’s website terrorist list with a Canadian connection including a major bad guy named Adnan El Shukrijumah who was reported to be travelling on a Canadian passport. So I decided to check how many of these five were on CBSA’s look out system. Short answer: zero.

**MLI:** Amazing.

**Newark:** I’d use a different word, but you get the point. As we’ve discussed above, we are finally starting to make some progress and I think the Canada-US Border Agreement and C-31 are huge steps forward. Having said that...it’s 2013 and it still isn’t done.

## Recommendations

- 1) Amend IRPA to modernize the legal definition of security related inadmissibility to better reflect the nature of the security threats we face.
- 2) Install biometric face-recognition systems at every port of entry to detect and interdict people who are inadmissible to Canada including those using forged documents who have already been removed from Canada for criminality or security based inadmissibility.
- 3) Extend the Safe Third Country Agreement to the EU and countries such as Australia, New Zealand, and Thailand.



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