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Do the Means Change the Ends? Express Entry and Economic Immigration in Canada

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The relationship between economy and community is a constitutive tension in the Canadian immigration state. With the rise of the knowledge economy, Canada mediated this tension through the concept of human capital, internalized in the points system. Introduced in 2015, Express Entry transformed the landscape of economic immigration in Canada. Express Entry is an online permanent residence application system. In this article, I argue that Express Entry is more than a change in form and process; it is a change in substance that shifts Canada's skilled immigration regime toward a neo-corporatist model. By shifting partial decision-making authority to the provinces and territories, on the one hand, and to the labour market, on the other, Express Entry rebalances the relationship between the federal government and private and sub-state parties. Furthermore, it accomplishes this rebalancing through the use of Ministerial Instructions, themselves a unique instrument which raise democratic transparency and accountability concerns.

La relation entre économie et communauté est une tension constitutive de la situation en matière d'immigration au Canada. Avec l'essor de l'économie du savoir, le Canada a joué un rôle de médiateur dans cette tension par le biais du concept de capital humain, intériorisé dans le système de points. Lancé en 2015, le service Entrée express a transformé le paysage de l'immigration économique au Canada. Entrée express est un système de demande de résidence permanente en ligne. Dans cet article, je soutiens qu'Entrée express est plus qu'un changement de forme et de processus; c'est un changement de fond qui fait passer le régime d'immigration des travailleurs qualifiés du Canada à un modèle néo-corporatiste. En transférant le pouvoir décisionnel partiel aux provinces et aux territoires, d'une part, et au marché du travail, d'autre part, Entrée express rééquilibre la relation entre le gouvernement fédéral et les parties privées et infra-étatiques. En outre, il procède à ce rééquilibrage par le biais d'instructions ministérielles, un instrument unique en son genre qui soulève des préoccupations en matière de transparence démocratique et de responsabilité.

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While economic priorities are often the central drivers of policy, immigration is always also about claims to membership in a political community.¹

Introduction: Canada's story of economic immigration

In many ways, economic immigration tells the constitutive story of the Canadian settler state. Shortly after passing the *Constitution Act, 1867*, Parliament passed the *Immigration Act, 1869*, which granted the Cabinet power to regulate immigration through Orders-in-Council. Three years later, Canada set out admissions criteria for the first time, banning criminals from entry. So emerged one of the defining features of Canadian national identity: the inextricability of immigration and nation-building.² Long before these legislative measures, however, labourers were immigrating

1. Triadafilos Triadafilopoulos, ed, *Wanted and Welcome? Policies for Highly Skilled Immigrants in Comparative Perspective* (Springer: New York, 2013) at 1.

2. See Catherine Dauvergne, *The New Politics of Immigration and the End of the Settler State* (New York: Cambridge University Press, 2016).

informally and under bilateral treaty arrangements.³ These mostly Chinese workers built the country's transcontinental railroad and worked in its mines and fisheries, only to have their immigration restricted upon the railroad's completion in 1885 with the enactment of the *Chinese Immigration Act*.⁴ This legislation, widely known as the Chinese head tax, has become an apologue in the Canadian historical narrative, a cautionary and regrettable tale about avarice and racism. But have these twin exigencies disappeared from immigration policymaking or do they, distasteful though they might be, represent the historical articulation of the ongoing tension between economy and community in matters of immigration? In this article, I argue that the relationship between economy and community is a constitutive tension in the Canadian immigration state, and that the introduction of the Express Entry regime for selecting economic immigrants represents yet another iteration of this tension by reinforcing the "rational, managerial, and economic focus" of immigration controls.⁵

The demands of the settler state meant that Canada understood quickly that economic immigration constructs the material and demographic nation, simultaneously building the physical economy and the national population. Reflecting this understanding, the dynamics of immigration have shifted significantly since the early days of nation building. Over Canada's immigration history, the pendulum has swung between selecting immigrants based on the needs of the labour market and selecting them based on considerations of national community. Today, the immigration state has a more complicated regulatory apparatus at its fingertips that it uses to direct a regime of stratified mobility: attracting the best and excluding the rest.⁶ Countries vie to attract talented economic immigrants by holding out special benefits at the same time that they refuse, interdict, and deport less desirable immigrants.⁷ With the rise of the knowledge economy, Canada mediated the tension between economy and community by the concept

3. See David Scott Fitzgerald & David Cook-Martin, *Culling the Masses* (Cambridge, MA: Harvard University Press, 2014) at 145.

4. See Ninette Kelley & Michael Trebilcock, *Making of the Mosaic: A History of Canadian Immigration Policy* (Toronto: University of Toronto Press, 2000) at 94-98; Fitzgerald & Cook-Martin, *supra* note 3 at 148-149.

5. James P Walsh, "Quantifying Citizens: Neoliberal Restructuring and Immigrant Selection in Canada and Australia" (2011) 15:6-7 *Citizenship Studies* 861 at 864.

6. See Sarah Fine & Lea Ypi, eds, *Migration in Political Theory: The Ethics of Movement and Membership* (Oxford: Oxford University Press, 2016) especially at 187 and c 9; Eleanore Kofman, "Citizenship, Migration and the Reassertion of National Identity" (2005) 9:5 *Citizenship Studies* 453.

7. See Ayelet Shachar, "Picking Winners: Olympic Citizenship and the Global Race for Talent" (2011) 120 *Yale L J* 2088; Sandra Lavenex, "The Competition State and Multilateral Liberalization of Highly Skilled Migration" in Michael Peter Smith & Adrian Favell, eds, *The Human Face of Global Mobility* (New York: Routledge, 2006) at 29.

of human capital, understood as the sum total of an individual's skills, knowledge, and experience. Internalized in the Canadian points system and exalted as the predictor of economic success and social adaptability, human capital has functioned as a signifier for the productivity of future citizens. In recent years, however, the role for human capital has shifted as Canada's economic immigration programs undergo significant changes.

To place this in context, economic immigrants constitute over half of the country's annual immigration target of approximately 300,000 people, making them the largest category of entrants.⁸ However, scholarship about economic immigration tends to focus on its extremes. At one pole is the highly mobile pool of global talent: cosmopolitan migrants whom states lure with promises of prestigious positions and accelerated citizenship.⁹ At the other pole is the less mobile pool of temporary unskilled labourers, the precarious workers whom states desperately need but refuse to keep.¹⁰ While scholarship focuses on these extremes, the majority of the 156,000 economic immigrants admitted to Canada each year are actually skilled workers and their accompanying family members.¹¹ In other words, the wide and squishy middle of the economic immigration hierarchy generates most of Canada's economic immigrants. This broad middle used to be pulled into the country through the points system, which calculated the human capital and adaptability of skilled workers based on a numerical points assessment. However, over the past decade, economic immigration to Canada has stealthily changed form, culminating in the Express Entry system.

The advent of Express Entry in January 2015, though not dismantling the points system, significantly shifted its shape and content, none of which is readily apparent from a close reading of the legislation. The government agency in charge of immigration, Immigration, Refugees and Citizenship Canada (IRCC), suggests that Express Entry is largely a

8. See Immigration, Refugees and Citizenship Canada, *2017 Annual Report to Parliament on Immigration, Minister: the Hon Ahmed D Hussen* (Ottawa: IRCC, 2017) [IRCC 2017 Annual Report].

9. See Ayelet Shachar, "The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimes" (2006) 81:1 NYUL Rev 148; Saskia Sassen, *The Global City: New York, London, Tokyo*, 2nd ed (Princeton, NJ: Princeton University Press, 2001).

10. See Faye Faraday, *Profiting from the Precarious: How Recruitment Practices Exploit Migrant Workers* (Toronto: Metcalfe Foundation, 2014); Faye Faraday, *Made in Canada: How the Law Constructs Migrant Workers' Insecurity* (Toronto: Metcalfe Foundation, 2012); Sarah Marsden, *Enforcing Exclusion: Precarious Migrants and the Law in Canada* (Vancouver: UBC Press, 2018); Luin Goldring & Patricia Landolt, eds, *Producing and Negotiating Non-Citizenship: Precarious Legal Status in Canada* (Toronto: University of Toronto Press, 2013), c 4.

11. See IRCC Canada 2017 Annual Report, *supra* note 8.

change in form.¹² But all good students of critical legal studies know that form changes substance. Indeed, parts of the legal scaffolding of Express Entry render the online intake management system—the eligibility stage, which will be explored further in the second section of this paper—far more significant than it initially appears. Not only does Express Entry rebalance the relationship between the federal government and private and sub-state parties, it accomplishes this rebalancing through the use of Ministerial Instructions, themselves a unique policy instrument which raise democratic transparency and accountability concerns. The means of Express Entry thus mark a shift in ends. This shift sounds in two registers: the means of creating Express Entry through Ministerial Instructions and the means of selecting economic immigrants internal to the Express Entry regime. These means change the relationship between economy and community, moving us further toward an immigration model of people as economic market outputs and further away from people as political and social members in a national community.

Part I begins with an analysis of Canada’s story of economic immigration. In this Part, I briefly review the history of economic immigrants in the Canadian state and then turn to situating the Canadian model among the various typologies of economic immigration. This section focuses on the historical turn away from the labour market and the theoretical turn toward human capital. The human capital model, expressed in the points system, dominated economic immigration discourse in Canada and beyond for at least three decades. This section analyzes the meaning of human capital in the international mobility context and the balance of economy and community internalized there. The concept of human capital in the points system sought to calibrate short-term labour fit with long-term citizenship by including measures of personal attributes such as age and adaptability. The points system suffered some poor outcomes, however, and the rise of Express Entry marks a turn away from human capital (although it retains the points system and layers another on top, as explained in Part II) and toward the national and regional labour markets.

Part II provides a comprehensive description of the Express Entry system. This description, while sometimes technical, is necessary to understand the analysis that follows. A robust academic explanation of the law and operation of Express Entry has not yet been published, and

12. This language pervades government documents about the Provincial Nominee Program (PNP). See, e.g., Immigration, Refugees and Citizenship Canada, *The Express Entry Year-End Report 2016* (Ottawa: IRCC, 2017) [EE Year-End Report 2016] (“Express Entry is Canada’s application management system”). The Liberal government changed the name of Citizenship and Immigration Canada (CIC) to Immigration, Refugees and Citizenship Canada (IRCC) soon after taking office.

scholars remain confused about which parts of the original points system survive and where they reside. Moreover, although both the points system and the Express Entry regime are juridical creations, the bulk of academic analysis about them is produced by other disciplines, notably political science. This Part contributes to legal understandings of the text and operation of the Express Entry system. It also provides the foundation for considering how changes to the selection mode and criteria for entry of economic immigrants has repercussions both for lawmaking processes and the distribution of legal authority, examined in Part III, and for the relationship between economy and community in the immigration state.

In Part III, I examine the more profound changes accomplished by the Express Entry regime. Based on the operational framework laid out in Part II, I critically examine the legal creation of Express Entry (the basis of its legal authority) and the legal decision makers instantiated by it (the distribution of its legal authority). The former focuses on the legal scaffolding of the Express Entry regime as created through the instrument of Ministerial Instructions, while the latter focuses on the shift of decision-making authority to employers and provinces. Express Entry marks a fundamental shift in both the role of the Canadian federal government in selecting immigrants and its historically more consultative processes of immigration lawmaking. This is much more than a swing of the pendulum toward the labour market. If indeed “immigration is the last bastion of sovereignty” and the core of that sovereignty is the ability to pick members, then permitting employers and provinces to choose immigrants loosens the knot between immigration and nation-building.¹³ The nature of decentralizing admissions decisions in this manner means that the federal government loses control over selection criteria. Moreover, at the same time that decision making authority was devolved, the rise of Ministerial Instructions removed the capacity for public participation in immigration policymaking. Together, these changes suggest that the values conveyed by Express Entry suggest a different, less significant role for the community and citizen in the immigration selection process. The article then concludes with some thoughts about the constitutive tension between economy and community in our ever-evolving knowledge society.

I. *Embodied economics? The points system in perspective*

Following the concept of human capital through recent Canadian history reveals its established role as a backbone of economic immigrant selection as well as its changing shape over time. As part of broader efforts to

13. Catherine Dauvergne, *Making People Illegal* (Cambridge: Cambridge University Press, 2008).

compare economic immigration laws across countries, the International Organization of Migration and the Organization for Economic Cooperation and Development distinguish between two models of skilled immigration: supply-driven systems (human capital selection) and demand-driven systems (employer selection).¹⁴ The variable in these models is the selector and, implicitly, the selection criteria. Rey Koslowski suggests an intervening third model, the *neo-corporatist model*, which is based on government selection of immigrants using a points system with extensive business and labour participation.¹⁵ The neo-corporatist model lies between the *human capital model*, which is based on government selection of immigrants using a points system, and the *demand-driven model*, which is based on employer selection of immigrants. The former Canadian points system model was the prototype of the human capital model; the United States is the prototype for the demand-driven model; and Australia was Koslowski's catalyst for the hybrid neo-corporatist model.¹⁶ As Canada has refined its human capital approach over time, so too has it moved along this continuum toward the neo-corporatist model.

Neo-corporatism is a political economy approach to state-society relations that is based on a system of interest representation.¹⁷ Typically, it requires direct participation by civil society intermediary groups.¹⁸ When applied to the immigration context, neo-corporatism focuses on the way that states “manage the pressures deriving from transnational and international constraints with the structure of interests internal to the receiving society.”¹⁹ It is most applicable in the context of economic immigration where business interests seek to represent their labour needs in state fora. Both as a theory and a framework, neo-corporatism adds third parties back into immigration policymaking where they may have been absent before. I use the term “third parties” broadly to refer to both sub-state and non-state actors in order to mark distinctions from former

14. See Anna Boucher & Lucie Cerna, “Current Policy Trends in Skilled Immigration Policy” (2014) 52:3 Intl Migration 21.

15. Rey Koslowski, “Selective Migration Policy Models and Changing Realities of Implementation” (2014) 52:3 Intl Migration 26 at 27.

16. *Ibid.*

17. Philippe C Schmitter, “Neo-Corporatism” in Bertrand Badie, Dirk Berg-Schlosser & Leonardo Morlino, eds, *International Encyclopedia of Political Science* (USA: Sage Publications, 2011). It is often juxtaposed to pluralism, which envisions a more spontaneous and episodic relationship between groups and the state.

18. Éric Montpetit, “Can Québec Neo-Corporatist Networks Withstand Canadian Federalism and Internationalization” in Alain Gagnon, ed, *Quebec: State and Society* (Toronto: University of Toronto Press, 2004).

19. Giuseppe Sciortino, “Toward a Political Sociology of Entry Policies: Conceptual Problems and Theoretical Proposals” (2010) 26:2 J Ethnic & Migration Studies 213 at 218.

centralized models of federal immigration jurisdiction. As an ideal-typical model, neo-corporatism illuminates the marked and growing space for labour market interests in immigration policymaking.

For Koslowski, Australia is the ideal-typical model of neo-corporatism because “government, industry, and labour collectively shape immigration policy much like “neo-corporatist” economic development strategies.”²⁰ These models require some disaggregation, as Koslowski recognizes but does not undertake, in order to understand their arterial pathways. This disaggregation runs along four axes: Who triggers the immigration process? Who selects? According to what criteria? Who sets the selection criteria and how? The answers to these questions will not always be straightforward, but provide insight into how large or small the role for economic interests in immigration matters. As a lens on the shifting relationship between economy and community, neo-corporatism captures the tenor of the new Express Entry system. It adds rigour to the claim that Express Entry has shifted all of the axes of economic immigration closer to the market-oriented, demand-driven pole.

Canada has a long history of business interests setting immigration priorities.²¹ Starting with the Canadian Pacific Railway agreement in 1880, industrialists earnestly promoted immigration as a source of labour.²² Although business support would wax and wane in tandem with xenophobic sentiments, business interests tended to prioritize labour. The years leading up to World War II focused on maintaining a homogeneous society by growing the population in line with racial and national origin restrictions. After World War II, sponsored family immigrants dominated admissions while the economy grew.²³ Finally, in 1967, the Canadian government ended formal discrimination.²⁴ The priority of economy returned to the forefront with the Liberal Government’s White Paper on immigration

20. Koslowski, *supra* note 15 at 27.

21. See Fitzgerald & Cook-Martin, *supra* note 3 at 143-144.

22. Kelley & Trebilcock, *supra* note 4 at 94-95; Valerie Knowles, *Strangers at our Gates: Canadian Immigration and Immigration Policy, 1540–2015* (Toronto: Dundurn, 2016) at 72, referring to contract with Andrew Onderdonk for western CPR construction in 1880. See also articles of agreement introduced by Sir Charles Tupper in Royal Commission, “Report on the Canadian Pacific Railway” vol III (1882) at 22-23.

23. See Edwina O’Shea, “Missing the Point(s): The Declining Fortunes of Canada’s Economic Immigration Programs” (2009) Transatlantic Academy Paper Series at 4.

24. The move was underway with the 1962 Order in Council and amended Immigration Regulations, but those reforms left administrative discretion to discriminate intact. See Triadafilopoulos, *supra* note 1 at 23-28. Finally, the 1967 Immigration Regulations marked the introduction of the points system and the end of ethnic selection.

policy in 1966.²⁵ Its recommendations reconnected immigration to the labour market and eliminated discrimination by employing objective criteria to assess skills and experiences. The resulting points system for independent immigrants then governed Canadian immigration law for the next fifty years.²⁶

1. *The gradual entrenchment of human capital*

Canada is widely celebrated in immigration circles for pioneering the points system, which was designed to measure the human capital of economic immigrants. The points system sought to assess potential for successful establishment in Canada.²⁷ It solicited educated and adaptable immigrants who could function as nimble and flexible inputs in the domestic labour market: filling gaps, rising through the ranks, and seamlessly shifting between firms. The points model has been emulated in other countries of immigration, including Australia, adopted in modified form in several other countries such as Denmark, Hong Kong, and the United Kingdom, and perennially debated in the United States and lately in Germany.²⁸ Most recently, however, Canada stands at the vanguard (after New Zealand and Australia) in segueing the points system into a hybrid labour market driven model of selection.

The points system represented the culmination of several currents in Canadian immigration law. First, it marked the shift from a sponsorship dominated kinship-based admission cohort to an economics-based admissions cohort. Second, it signaled a move from the short-term assessment of labour market needs to the longer-term assessment of employability and societal integration. Third, it clearly expressed the human capital approach to immigration selection, combining potential economic contribution and social integration in a set of selection factors. Far from static, the points categories and their allocations expressed different socio-political relationships to the labour market over time.

In its 1967 initial incarnation, the points system combined two sets of attributes: human capital factors, such as education and language, and labour market factors.²⁹ They were linked by the criteria of “occupational demand”—which was measured according to a list prepared by the

25. See Canada, Department of Manpower and Immigration, *White Paper on Immigration*, and Wallace B Chung & Madeline H Chung Collection (Ottawa: Queen’s Printer, 1966) [White Paper].

26. See PC 1967-1616, (1967) C Gaz II, vol 96, no 3, 1350-62.

27. See O’Shea, *supra* note 23 at 4.

28. Ayelet Shachar, “The Brave New World of Stratified Mobility” in Sarah Fine & Lea Ypi, eds, *Migration in Political Theory: The Ethics of Movement and Membership* (Oxford: Oxford University Press, 2016) at 181-182.

29. O’Shea, *supra* note 23 at 4.

Department of Manpower and Immigration—and “specific vocational preparation,” which assessed training for the occupation.³⁰ Under that system, labour market factors accounted for 35 points and human capital factors were worth a possible total of 40 points, with the passmark set at 50 points.³¹ The 1967 regulations also granted 15 points for “personal suitability” and 35 to 50 points for the presence of a family member, factors which could clearly tip the balance.³² The 1978 regulations maintained the passmark but reversed the balance in the selection factors, offering up to 48 points for labour market factors, and 32 points for human capital factors.³³ The increased value of labour market factors was primarily due to the introduction of the work experience factor and the increase of points available for specific vocational training and education.

The economic downturn in the early 1980s prompted the reduction of the number of independent immigrants by introducing the requirement of an approved job offer. This requirement was lifted in 1986, shifting selection points from occupational demand to language, reduced the assisted relative factor, and raised the passmark to 70 points, amid renewed attention to the integration of economic immigrants.³⁴ Again in 1992, triggered by concern about the need for an educated workforce in the knowledge economy, the government reemphasized the human capital factors.³⁵ These amendments raised the number of points available for education, adding more points for university or postsecondary credentials and specific vocational preparation. As Edwina O’Shea concludes:

Taken together with the 1986 measures, the effect was by 1993 to move a considerable distance away from the original vision of the 1978 regulations, with increasing emphasis placed on core human capital factors—language and education – and less weight given to the role of the labour market.³⁶

The move from occupational demand factors toward human capital factors can be seen as rooting the value of the economic immigrant “first and foremost in the individual’s personal attributes, rather than in his or

30. *Ibid* at 5.

31. See Alan G Green & David A Green, “The Economic Goals of Canada’s Immigration Policy, Past and Present” (1999) 25(4) *Can Public Policy* 425; O’Shea, *supra* note 23 at 5.

32. See O’Shea, *supra* note 23 at 5.

33. *Ibid* at 6; *Immigration Regulations*, SOR/78-172, s 42.

34. See O’Shea, *ibid* at 8.

35. *Ibid*; Canada, Bill C-86, *An Act to Amend the Immigration Act and Other Acts in Consequence Thereof*, 3rd Sess, 34th Parl, 1992, assented to on 27 December 1992.

36. See O’Shea, *supra* note 23 at 10.

her contributions as a worker per se.”³⁷ These changes took hold in the context of a more general effort to raise the absolute number of economic immigrants and to adjust the balance between economic immigrants and others in accordance with a 60:40 ratio.³⁸

The next decade marked the pinnacle of the human capital model. Despite suggestions from academics and government officials that recent economic immigrants were stumbling in the labour market, the regulations promulgated under the 2002 legislation, the *Immigration and Refugee Protection Act [IRPA]*, doubled down on the human capital framework.³⁹ There was a shared belief among economists and policymakers that micromanaging immigration based on labour market demand was “ineffective and created unrealistic expectations among new immigrants.”⁴⁰ The resulting set of core competencies, which is still in use today, valued language ability, education, age, occupational experience, and adaptability. The “personal suitability” and “assisted relative” factors were gone, both folded into “adaptability,” designed to measure potential to adapt based on relatives in Canada or spousal work or study here. The education factor was weighted in favour of post-secondary university qualifications. The occupational experience factor was tied to listed skilled occupations contained in the National Occupational Classification (NOC) taxonomy.⁴¹ There was no direct assessment of labour market demand, although an approved job offer could still garner 10 points. The focus instead was on prior work experience in a skilled occupation.⁴² Education, language, and work experience (human capital factors) could garner 70 points among them, while age and adaptability added another possible

37. Antje Ellerman, “Human Capital Citizenship and the Changing Logic of Immigrant Admissions” (2019) *J Ethnic & Migration Studies* 1 at 11.

38. See O’Shea, *supra* note 23 at 10-11.

39. The research showed that the temporary earnings gap between new immigrants and Canadian-born workers, which used to disappear over time, was becoming wider and narrowing more slowly than before, see O’Shea, *supra* note 23 at 9. In the White Paper, *supra* note 25, that preceded the *IRPA*, the government tied the occupational demand factor to the deteriorating outcomes of economic immigrants.

40. O’Shea, *supra* note 23 at 12, citing Citizenship and Immigration Canada, *Building a Strong Foundation for 21st Century: New Directions for Immigration and Refugee Policy and Legislation* (Ottawa: Citizenship and Immigration Canada, 1998); Canada, Immigration Legislative Review, Advisory Group, *Not Just Numbers: A Canadian Framework for Future Immigration*, Chair: Robert Trempe (Ottawa: Minister of Public Works and Government Services, 1997), c 6, criticizing labour market factors as disregarding the fluidity of labour markets and arguing that occupation-based selection did not prepare applicants well for establishing a life in Canada.

41. The NOC is a taxonomy of more than 30,000 occupations sorted in 500 Unit Groups and organized according to skill levels and skill types.

42. O’Shea, *supra* note 23 at 13.

20 points.⁴³ These allocations reflected a longer-term approach to labour market success and social integration.

In 2002, applicants required a minimum of 75 points to qualify as skilled workers eligible for permanent residency.⁴⁴ In their 2002 instantiation, “the *IRPA* selection factors represent an almost complete realization of a ‘human capital model’ for managing economic immigration.”⁴⁵ It is true that human capital factors pervaded the points system from its inception, but for some scholars the human capital model assumed full form only when the labour market demand factors were no longer a significant part of the points calculus. Certainly, the 2002 points system sits at the supply-side pole of the continuum: the immigration process is triggered by the skilled worker applicant, who is selected by the federal government according to its own points system criteria, which are largely insulated from labour market demands. Since 2002, the government has amended the points allocations, moving points from work experience to language and age, introducing additional weight for the job offer in the adaptability criteria (thus somewhat diluting the human capital approach), and setting the pass mark at 67 points (see Figure 1).⁴⁶

Figure 1: Points System, Immigration and Refugee Protection Regulations, ss. 78-83

Education	25 points
Official Languages	28 points
Experience	15 points
Age	12 points
Arranged Employment	10 points
Adaptability	10 points

2. *The measure of a human*

The shift from industrial, resource-based economies to knowledge ones has changed the type of economic immigrants that countries of immigration seek to attract. Skilled workers, especially highly-skilled workers, are the linchpins of the knowledge economy.⁴⁷ The term “human capital” seeks to identify and assemble these workers under its umbrella. In its first expression, Adam Smith in *The Wealth of Nations* described human

43. *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*].

44. *Ibid*, original version of regulations.

45. See O’Shea, *supra* note 23 at 13.

46. *IRPR*, *supra* note 43.

47. Definitions of the highly skilled vary, but the most obvious markers are education and occupation. There is an evolving consensus based on both tertiary education (meaning, completion of a formal two-year college degree or more) and professional occupation. For example, the Organization for Economic Cooperation and Development, together with Eurostat, developed a conceptual framework called the Canberra Manual focused on the science and technology occupations.

capital as acquired and useful talents.⁴⁸ Economists seized on the concept of human capital again in the 1960s, reaffirming its ties to economic growth.⁴⁹ It has been usefully defined as “the aggregation of the innate abilities and the knowledge and skills that individuals acquire and develop throughout their lifetime.”⁵⁰ The immigration context prioritizes the acquired skills component of this definition of human capital, specifically intergenerational transfers of knowledge (including language), work experience, and education. Notably, unlike physical capital, which is readily transferable, human capital is inseparable from the human being.⁵¹

In the immigration context, it is precisely this embodied nature that makes human capital such a powerful category. It is the idea that people add capital to their minds and bodies through skills and knowledge acquisition. This makes it uniquely suited to immigration because it travels easily with the individual across the international border. The mobility of human capital clarifies the important distinction between human capital and labour. For economists, the primary purpose of measuring and acquiring human capital is to increase the productivity of labour, but human capital and labour are not coeval.⁵² Human capital, understood as the stock of skills and knowledge in an individual, adds value to labour and acts as an input into labour productivity. It captures a number of pre-labour factors such as education, language, and past experience that represent a more holistic view of *homo economicus*. Under conditions of mobility, there are two interpretations of human capital that shed light on its conceptual value in selection processes.⁵³ Theodore Schultz and Richard Nelson and Edmund Phelps view human capital primarily as the capacity to adapt. In their view, human capital is especially useful in dealing with disequilibrium situations or changed environments (such as new country settings). Meanwhile, Michael Spence views human capital as a signal of ability rather than a set of independent characteristics that are useful in the production process. For Spence, human capital metrics are signals about some other characteristics of workers, such as motivation and discipline.

48. Adam Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations, Book 2* (1776).

49. See Mireille Laroche, Marcel Mérette & G C Ruggeri, “On the Concept and Dimensions of Human Capital in a Knowledge-Based Economy Context” (1999) 25:1 *Can Pub Pol’y* 87 at 87.

50. See *ibid* at 89.

51. See *ibid* at 90.

52. Paul M Johnson, *A Glossary of Political Economy Terms* (Auburn: Auburn University, 1994–2005), online: <www.auburn.edu/~johnspm/gloss/human_capital> [perma.cc/KYD4-5QYX]; Arthur O’Sullivan & Steven M. Sheffrin, *Economics: Principles in Action* (Upper Saddle River, NJ: Prentice Hall, 2003) at 5: “Human capital refers to the stock of skills and knowledge embodied in the ability to perform labour so as to produce economic value.”

53. For a selection of interpretations of human capital, see Daron Acemoglu & David Autor, *Lectures in Labor Economics*, online: <economics.mit.edu/files/4689> [perma.cc/6X3T-Y2TM].

Taken together, these perspectives explain that the relationship between human capital and labour productivity is not the whole picture; the metric of human capital implicitly captures other characteristics and capacities, ones that might facilitate integration into communities as much as markets.

In the immigration context, the concept of human capital underwrites the points system and is used to assess immigrant potential for the primary purpose of labour market integration, while still attuned to the immigrant's broader integration into society.⁵⁴ As demonstrated by political theorists, citizenship goes beyond bare legal status to encompass the political dimension of governance and participation and the psychological dimension of membership and belonging.⁵⁵ The weight accorded to human capital factors such as language skills, education, and adaptability criteria—such as family connections and past Canadian education and work—are directed toward these other dimensions of community and citizenship. Walsh explains this relationship: “[t]he points systems directly reflect such concerns as credentials and other signs of human capital are constituted as markers of personal initiative, self-improvement, risk-avoiding behavior and other moral traits and ‘attributes which evidence a high degree of self-sufficiency.’”⁵⁶ These characteristics, while undoubtedly animated by the state's desire to help economic immigrants adjust to cyclical and structural labour market changes,⁵⁷ are nonetheless embodied and individualized, and thus translatable into other domains. Stated differently, human capital builds the community, too. Although the sole governing criterion for selecting economic immigrants under the *IRPA* is their “ability to become economically established in Canada,” embedded in the idea of “establishment” are broader dimensions of citizenship.

In theory, human capital tries to gauge both economic potential and social adaptability, acknowledging that human beings enter both an economy and a community when they immigrate, and that success in the former is intertwined with settlement in the latter. Economic success,

54. See Yasmeen Abu-Laban & Christina Gabriel, *Selling Diversity: Immigration, Multiculturalism, Employment Equity and Globalization* (Peterborough: Broadview Press, 2002) at 79; Yasmeen Abu-Laban, “Jean Chrétien's Immigration Legacy” (2004) 9:1 Rev Const Stud 133.

55. Jean L Cohen, “Changing Paradigms of Citizenship and the Exclusiveness of the Demos” (1999) 14:3 International Sociology 245; Will Kymlicka & Wayne Norman, “Return of the Citizen: A Survey of Recent Work on Citizenship Theory” (1994) 104:2 Ethics 352; Joseph Carens, *Culture, Citizenship, and Community. A Contextual Exploration of Justice as Evenhandedness* (Oxford: Oxford University Press, 2000).

56. See Walsh, *supra* note 5 at 874.

57. On labour market changes, see Ana Ferrer, Garnett Picot & William Craig Riddell, “New Directions in Immigration Policy: Canada's Evolving Approach to the Selection of Economic Immigrants” (2014) 48:3 Intl Migration Rev 846 at 850; *Immigration Refugee Protection Act*, SC 2001 c 27, s 12(2) [*IRPA*].

however, proved elusive. This was not news to labour economists or sociologists, who had warned of declining economic outcomes of immigrants for over a decade.⁵⁸ Almost at the same time that the *IRPA* crystallized the human capital approach to economic immigration, the data on deteriorating immigrant economic outcomes started to grow, revealing problems of unemployment and underemployment that linked up with concerns about brain waste.⁵⁹ Several studies noted the rise in the earnings gap between recent immigrants and Canadian born workers.⁶⁰ They pointed to explanations “such as the changing source regions of entering immigrants, declining returns to foreign labor market experience, deterioration in the outcomes for new labor market entrants in general, education quality, language skills, and sectoral economic downturns.”⁶¹ Ferrer et al. pointed out that language skills seem “to mediate the rate of return to formal education” (immigrants with strong language skills can more easily convert their education to earnings),⁶² however, the “apocryphal immigrant taxi driver with a Ph.D.”⁶³ became increasingly real. Labour market discrimination combined with obstacles to foreign credential recognition compounded the problem. Research suggested that the latter were primarily due to provincial and independent licensing bodies—problems of federalism and private sector professional regulation, in other words, not problems squarely within the purview of immigration law.⁶⁴ Concurrently, the relatively low minimum pass mark of 67 and administrative inefficiencies started to generate a growing backlog of economic class applications.

There were several ad hoc responses to these concerns—initiatives for foreign credential recognition, an uptick in the number of immigrants admitted because they were nominated through provincial programs to meet local labour-market needs, the expansion of the temporary foreign

58. See Ferrer, Picot & Riddell, *supra* note 57 at 850. See also Jeffrey G Reitz, “Immigration Employment Success in Canada, Part II: Understanding the Decline” (2007) 8:1 Intl Migration & Immigration 37; Statistics Canada, *The Deteriorating Economic Welfare of Immigrants and Possible Causes: Update 2005*, by Garnett Picot & Arthur Sweetman, *Analytical Studies Branch Research Paper Series No 262* (Ottawa: Business Labour Market Analysis Division, Stats Can, 2005); James T McDonald et al, *Canadian Immigration: Economic Evidence for a Dynamic Policy Environment* (Montreal: McGill Queen’s University Press, 2010).

59. See Ferrer, Picot & Riddell, *supra* note 57 at 850. Note the temporal gap here: the data analyzes immigrants who arrived *before* the human capital points system.

60. *Ibid* at 846-867. See also studies cited above in note 58.

61. *Ibid* at 850; Garnett Picot, Feng Hou & Simon Coulombe, “Poverty Dynamics Among Recent Immigrants to Canada” (2008) 42:2 Intl Migration Rev 393; Picot & Sweetman, *supra* note 58.

62. See Ferrer, Picot & Riddell, *supra* note 57 at 850.

63. O’Shea, *supra* note 23 at 15.

64. See discussion in Jeffrey G Reitz, “Taxi Driver Syndrome: Behind-the-Scenes Changes are Creating New Problems on Top of Old Ones” (2011) 19:2 Literary Rev of Can 20.

worker program, and the introduction of the Canadian Experience Class, a permanent entry stream for those already in Canada temporarily for work or school⁶⁵—all of which foreshadowed the shift toward employers and provinces and away from the federal human capital model. The minority Conservative government elected in 2006 initiated a series of ambitious reforms, which accelerated when it won a majority in 2011, amending the legislation more than a dozen times and making even larger changes outside of the formal legislative arena.⁶⁶ These multivalent changes shared a common core: immigration categories were rationalized and immigrant archetypes began to permeate government discourse.⁶⁷ In the economic class, meeting immediate labour market needs became the premise for the creation of new or revised streams—and federal skilled workers were up first.

II. *Express Entry as an intake management system and beyond*

The year 2008 marked a watershed in Canadian immigration law. The backlog of skilled worker applications reached 600,000.⁶⁸ In part to handle this backlog, the government made use of a novel legislative instrument in the immigration realm: Ministerial Instructions. Beginning that year, the government amended the *IRPA* to allow the Minister to issue various sets of instructions. Significant for shifting away from the pure human capital model is section 87.3, under which authority the Minister may alter the processing of applications, including electing not to process some of them.⁶⁹ Later Ministerial Instructions allowed the minister to triage applications according to revised criteria, including the requirement for experience in a listed occupation, an arranged offer of employment, or Canadian legal residency.⁷⁰ In 2008, the pendulum of the Canadian economic immigration program began to swing back to labour market demand and the path was paved for Express Entry.

In January 2015, the Express Entry system opened its online portals for applications. Then-Minister Jason Kenney described it as a “dating site,” and it was widely reported to be an online matchmaker, connecting

65. See O’Shea, *supra* note 23 at 18-20; Naomi Alboim & Karen Cohl, *Shaping the Future: Canada’s Rapidly Changing Immigration Policies* (Toronto: Maytree Foundation, 2012).

66. These larger changes were accomplished by Ministerial Instructions, detailed below.

67. See Peter J Carver, “A Failed Discourse of Distrust Amid Significant Procedural Change: The Harper Government’s Legacy in Immigration and Refugee Law” (2016) 21:2 *Rev Const Stud* 209.

68. See *Liang v Canada*, 2012 FC 758.

69. See O’Shea, *supra* note 23 at 22; *IRPA*, *supra* note 57, ss 87.4, 87.5 (terminated pre-February 2008 applications with no decision by March 2012).

70. Ministerial Instructions, (2008) C Gaz I, Vol. 142, No. 48, at 3043, online (pdf): <<http://publications.gc.ca/gazette/archives/p1/2008/2008-11-29/pdf/g1-14248.pdf>> [perma.cc/86Y2-NRNU].

immigrants to employers and provinces.⁷¹ Designed to provide flexibility, processing speed, and responsiveness to national and regional labour markets, the Express Entry system creates a pool of candidates from which employers, provinces, and IRCC can select immigrants.⁷² Although described as a new process for managing existing economic immigration programs, Express Entry loosely coincided with the substantive revision and expansion of those programs, leaving the the terrain of economic immigration almost unrecognizable. New categories were created, while other regulatory categories were rendered defunct, and all of this was accomplished through Ministerial Instructions. Less than a year after launch, the Conservative government was defeated. The new Liberal government that took office inherited a wildly revised immigration regime and an uncharted Express Entry system, both of which it continues to refine.

In several respects, the Express Entry system simply took the elements of the former points system and rearranged them into a different configuration. Indeed, IRCC expressly states that Express Entry does not change the immigration program requirements.⁷³ It is true that the definitions of skill remain the same. They continue to be based on the National Occupational Classification, which was always part of the points system determination. The human capital criteria also remain broadly the same, although they internalize more stringent pass thresholds for language and educational assessments and weigh these differently. On top of the regulatory points scheme, however, Express Entry layered a second points system, the Comprehensive Ranking System (CRS), which uses the tools of points allocation and ranking to prioritize applications vouched for by provinces or employers. Express Entry is not only an online management tool, it is also a new selection model. The choice to double down on the points system while prioritizing provincial nominations and job offers means that different applicants will top the list, and the invitation-only ranking system means that only some of those in the pool will make the cut.

71. See Steven Chase, "Ottawa to play matchmaker for foreign workers: New system will be 'like dating site' for top global talent, Immigration Minister Jason Kenney tells the Globe," *The Globe and Mail* (2 January 2013) A1.

72. Immigration, Refugees and Citizenship Canada, "Express Entry Year-End Report 2015" (Ottawa: IRCC, 2015), online: <www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/express-entry-year-end-report-2015.html> [perma.cc/2CFX-LR4X] [EE Year-End Report 2015].

73. Express Entry questions and answers (2014), online: <www.canada.ca/en/immigration-refugees-citizenship/news/notices/notice-express-entry-questions-answers.html#17> [perma.cc/XX6N-S35X] [EE Q & A].

1. *The eligibility stage*

The application process begins with the creation of an online Express Entry profile that functions as an “expression of interest” in immigrating to Canada.⁷⁴ There is no cost for creating a profile. This is the first threshold of the selection process, the *eligibility stage*. To be eligible to be part of the Express Entry pool, applicants must meet the regulatory criteria for one of the named economic sub-classes: Federal Skilled Workers (FSW), Federal Skilled Trades (FST), the Canadian Experience Class (CEC), or some portions of the Provincial Nominee Program (PNP).

The legal basis for selecting immigrants in the economic classes remains their ability to become economically established in Canada.⁷⁵ This is measured slightly differently for each sub-class. **Federal Skilled Workers** are the largest of the skilled immigrant sub-classes.⁷⁶ Since 1967 skilled workers have been assessed under the points system. As set out in Part I, the points system uses point allocations to identify “high human capital” immigrants with the ability to establish economically in Canada.⁷⁷ First, however, FSWs must meet certain minimum regulatory requirements: one year of work experience, language proficiency, an assessed educational credential, and settlement funds or a job offer.⁷⁸ If an applicant meets these minimum regulatory requirements, then IRCC assesses her application based on the regulatory points grid.⁷⁹ The minimum points threshold remains 67 points, and Express Entry candidates will not succeed in obtaining permanent residence if they score lower than this.⁸⁰ The points system thus survives in the deep underbelly of Express Entry, operating as part of the test for eligibility.⁸¹ If the applicant meets all of

74. The Express Entry program was originally named “Expression of Interest” after the terminology of the similar Australian SkillSelect program.

75. *IRPA*, *supra* note 57, s 12(2).

76. See Lynn Fournier-Ruggles, *Canadian Immigration and Refugee Law for Legal Professionals*, 3rd ed (Toronto: Edmond Montgomery, 2015) at 233 (the majority were admitted as federal skilled workers); Immigration, Refugees and Citizenship Canada, *Report on Plans and Priorities 2015–16* (Ottawa: IRCC, 2016), online: <www.cic.gc.ca/english/resources/publications/rpp/2015-2016/> [perma.cc/QV8Y-2ZR7] [Report on Plans and Priorities].

77. *Ibid.*

78. See *IRPR*, *supra* note 43, s 75(2). These appear to have been first added in 2006, with additional threshold criteria added in subsequent years. The term “assessed educational credential” refers to the requirement to have education assessed by an IRCC designated organization.

79. Immigration, Refugees, and Citizenship Canada, *Eligibility to Apply as a Federal Skilled Worker (Express Entry)*, (Ottawa: IRCC, 2018), online: <www.cic.gc.ca/english/immigrate/skilled/apply-who.asp> [perma.cc/X6HV-XAJ3].

80. Immigration, Refugees and Citizenship Canada, *Six Selection Factors* (Ottawa: IRCC, 2018), online: <www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/express-entry/eligibility/federal-skilled-workers/six-selection-factors-federal-skilled-workers.html> [perma.cc/GNQ2-2RFF].

81. Remember that the points system only applies to FSWs, not CECs or FSTs.

these eligibility requirements, then s/he is placed in the Express Entry pool to create a group of pre-screened candidates. In other words, all of the candidates in the Express Entry pool would have qualified as federal skilled workers under the old points regime. Express Entry represents an additional level of scrutiny and extraction.

The two other occupational streams of Express Entry—the **Federal Skilled Trades** and **Canadian Experience Class** are relatively new programs, neither of which is subject to the original points assessment. The government created the FST sub-class in 2013 to deal with labour shortages in the trades. It offers permanent residence to skilled trades people. This sub-class operates on a pass/fail basis with four mandatory regulatory criteria.⁸² Notably, there is no education requirement for this class, but education will earn trades applicants points under Express Entry CRS criteria. The CEC sub-class is a two-step transitional category from temporary to permanent status. Created in 2008, it initially provided a streamlined path to permanent residence for temporary foreign workers and international students who have some Canadian experience. The core requirement now is to have 12 months of skilled work experience in Canada during the three years prior to application.⁸³ IRCC explains that the CEC complements the FSW program by using different criteria—such as requiring Canadian work experience but not requiring education—to “retain talented workers who have demonstrated a capacity to integrate successfully and contribute to the Canadian economy.”⁸⁴

Finally, the **Provincial Nominee Program**, also discussed in Part III, is for applicants selected by the provinces or territories. Express Entry applies to a portion of the provincial nominee programs. It results from the shared federal and provincial jurisdiction over immigration and is designed to fill regional labour and demographic shortfalls.⁸⁵ PNPs rest

82. *IRPR*, *supra* note 43, s. 87.2(1), (3)(a)-(c). Trades people must: work in a skilled trade occupation as listed in the NOC, meet minimum language competency requirements, which are lower than for skilled workers, have at least 2 years of full-time work experience (or its equivalent) in the last 5 years performing most of the NOC duties, and have relevant employment experience, either trade certification or Canadian work experience.

83. See *ibid*, ss 87.1(2)(a),(b). Proficiency in English or French is also required. There is no longer an education requirement; Delphine Nakache & Leanne Dixon-Perera, “Temporary or Transitional? Migrant Workers’ Experiences with Permanent Residence in Canada” (2015) 55 *IRPP*.

84. Report on Plans and Priorities, *supra* note 76. See Regulations Amending the Immigration and Refugee Protection Regulations (Canadian Experience Class), “Regulatory Impact Analysis Statement” (9 August 2008) *C Gaz*, vol 142, no 32 [Regulatory Impact Statement]. In this Regulatory Impact Statement, which accompanied the regulations, the government noted that the skilled worker program was not responsive enough to the labour market and overemphasized formal education. See also O’Shea, *supra* note 23 at 20.

85. See *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 95 [*Constitution Act*] (establishes concurrent jurisdiction for immigration and agriculture).

on a distinction between selection and admission: the provinces are in charge of selection and the federal government is in charge of admission. Ultimately, the federal government makes the final decision to admit based on its discretion as well as its administration of inadmissibility requirements.⁸⁶ The PNP diverges from the other Express Entry categories in two respects: in terms of jurisdiction, it permits the provinces to select from the Express Entry pool based on the nomination system; and in terms of breadth, PNPs operate both within and outside of the Express Entry system. For those provincial nominees processed through the Express Entry pool, applicants must meet both federal and provincial criteria.

2. *The invitation stage*

Placement in the Express Entry pool marks the beginning of the *invitation stage*, where the applicant is next ranked according to the Comprehensive Ranking System (CRS). At this stage, the CRS points-based system scores and ranks candidate profiles out of 1,200 points, employs slightly different factors than the original system, and is expressly geared toward generating relative rankings of the candidates in the pool. The highest CRS ranking applicants are issued *invitations to apply*. Placement in the Express Entry pool marks the beginning of the invitation stage, where the applicant is next ranked according to the Comprehensive Ranking System (CRS) (see Figure 2).

Figure 2: Comprehensive Ranking System

Core Human Capital Factors (maximum 460 or 500)

	Points with spouse or common law partner	Points without spouse or common law partner
Age	100	110
Education	140	150
Official language proficiency	150	160
Canadian work experience	70	80
Total (maximum)	460	500

Spouse or Common Law Partner Factors (maximum 40)

Education	10
Official language proficiency	20
Canadian work experience	10
Total (maximum)	40

86. See Report on Plans and Priorities, *supra* note 76. Also, this mirrors federal paramouncy contemplated by s 95.

Skill Transferability Factors (maximum 100)

Education	
Official language proficiency + post-secondary degree	50
Canadian work experience + post-secondary degree	50
Total (maximum)	50
Foreign work experience	
Official language proficiency + foreign work experience	50
Canadian work experience + foreign work experience	50
Total (maximum)	50

Additional Factors (maximum 600)

Brother or sister living in Canada (permanent resident or citizen)	15
French language proficiency (with poor English skills)	15
French language proficiency (with fair English skills)	30
Post-secondary education in Canada (1-2 years)	15
Post-secondary education in Canada (3+ years)	30
Arranged employment (NOC 00)	200
Arranged employment (NOC 0, A, B)	50
Provincial or territorial nomination	600
Total (maximum)	600

The CRS assessment is divided into four categories: core human capital factors, spousal factors, skills transferability, and additional factors. The “core human capital factors” are contained within the first category: age, education, language proficiency, and Canadian work experience. The third category, skills transferability, contains the human capital factors in various combination such as post-secondary education and language, work experience and education, and language and work experience. The maximum number of CRS points for the first three categories (human capital, spousal factors, and skills transferability) is 600 points. These first three categories, sometimes called the “core CRS score,” share some features of the regulatory points system to the extent they measure age,

language, work experience, and education, but some of those points are allocated differently and it is a relative ranking, not an absolute one.

The most significant innovation of the Express Entry system is the fourth and final category, additional factors, which includes points for the job offer or provincial nomination. In its first incarnation, a job offer or provincial nomination each yielded 600 points on its own. Now, while a provincial nomination still nets 600 points, a job offer in the highest level National Occupational Classification (NOC) 00 (senior management) will net 200 points, while a job offer in a NOC 0 (management), A (professional), or B (technical and skilled trades) field will net 50 points. The CRS points allocation for a job offer or provincial nomination significantly changes the skilled immigration regime, tying it to immediate labour market and regional needs and institutionalizing some measure of decision-making power for employers and provinces.⁸⁷ The former points allocation for a job offer meant that “qualified candidates who...have a job offer *will* get enough points to ensure they are ranked high enough to get an invitation to apply.”⁸⁸ Now, however, though a job offer may tip the balance, it is no longer enough to guarantee an invitation.

3. *Express Entry as a matchmaking system*

The initial version of Express Entry was touted as a matchmaking system because it matched immigration applicants to employers or provinces. The pool is designed to be searchable by employers and provinces and territories. In the beginning, if applicants did not have a job offer in hand, they had to register with the Government of Canada’s Job Bank. This is no longer a requirement. To apply for Express Entry, applicants may begin the process by either creating their online Express Entry profile with a job offer in hand, or they may create the profile and hope that an employer pulls them from the pool. To apply with a provincial nomination, applicants may either apply through a specific provincial nominee program or create an Express Entry profile, which may be found by provinces and territories searching the pool, who will then issue a “notification of interest,” urging the applicant to apply for their provincial nominee program.⁸⁹

87. Immigration, Refugees and Citizenship Canada, *Comprehensive Ranking System (CRS) Criteria-Express Entry* (Ottawa: IRCC, 2017), online: <www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/express-entry/eligibility/criteria-comprehensive-ranking-system/grid.html> [perma.cc/6YZN-PUJ5].

88. The Immigration Times, “Entry Criteria and the Comprehensive Ranking System,” online: *The Immigration Times* <www.theimmigrationtimes.com/canada/345-entry-criteria-and-the-comprehensive-ranking-system> [perma.cc/3WY4-VMLA] [emphasis added].

89. Lynn Fournier-Ruggles, *Canadian Immigration and Refugee Law for Legal Professionals*, 4th ed (Toronto: Emond, 2018) at 281-284.

At the invitation stage, IRCC issues *invitations to apply* to the highest ranked candidates according to the CRS system. The old system of processing applicants according to their place in the queue is discarded in order to “create efficiencies.”⁹⁰ IRCC issues invitations in “rounds,” with multiple rounds each year. These rounds occur through Ministerial Instructions that specify the date and time of the round of invitations, the number of candidates who will receive an invitation, and, if applicable, the programs included in the round.⁹¹ At this point, the relative nature of the CRS process becomes apparent. An applicant’s rank in the pool turns on which other candidates are in the pool at the time of the round and whether the round is general or program-specific. It is entirely possible that a candidate would maintain the same absolute number of CRS points (435 points) and not receive an invitation in the first round but receive one in a subsequent round.

Those who receive invitations to apply have 90 days to file their online application for permanent residence. The application for permanent residence will depend in part on the applicant providing proof of the representations they made throughout the Express Entry process, as well as on meeting settlement fund and regulatory requirements. One objective of Express Entry was to cut processing time from up to 24 months to 6 months. IRCC undertakes to process permanent residence application in six months from filing, and its report says that it has accomplished this timeline in 80% of cases.⁹² If an *invitation to apply* is not issued, the application will only stay in the Express Entry pool for one year. Applicants will exit the Express Entry pool when their profile expires after one year in the pool, when they decline an invitation to apply and do not submit an application within the 90-day time limit, when they withdraw their profile, or when their application is submitted for processing.⁹³

The staging of the points system and regulatory criteria and the CRS scoring system suggest that the Express Entry system is rationalized, measurable (and thus predictable), and transparent. In part, this is true.

90. *Regulations Amending the Immigration and Refugee Protection Regulations*, PC 2014-1246, (2014) C GAZ II, 2942.

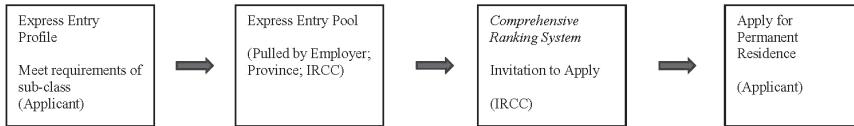
91. See Immigration, Refugees and Citizenship Canada, *Ministerial Instructions respecting the Express Entry system* (Ottawa: IRCC, 26 June 2018), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/ministerial-instructions/express-entry-application-management-system.html>>. For an example of these invitation rounds, see: Immigration, Refugees and Citizenship Canada; *Ministerial Instructions respecting invitations to apply for permanent residence under the Express Entry system #118* (Ottawa: IRCC, 29 May 2019), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/ministerial-instructions.html#toc1>>.

92. EE Year-End Report 2015, *supra* note 72.

93. *Ibid.*

Applicants can figure out their own eligibility and even CRS scores. They cannot, however, predict the parameters of the rounds, nor can they rank themselves; that depends on the other applicants in the pool.

Figure 3: Express Entry Application and Selection Process



4. *Assessing the Express Entry system*

Under the old first-come, first-served model, if an applicant met or surpassed the pass mark set by the Minister, they were considered eligible for permanent residence. Skilled worker applications were not explicitly compared against one another and were processed in order of receipt. This led to long backlogs, but there were no unknown rankings or cut-off thresholds. It was a bright-line system with less room for discretion in terms of applying the points criteria.⁹⁴ In contrast, while the Express Entry model works on publicly available selection criteria, it does not have a set pass mark. Instead, it is a relative system. The relative nature of the CRS scoring grid makes applications temporally specific as the points threshold moves with each round. Moreover, the selection criteria that carries each round is easily molded by adjusting the cap on each round, or the sub-class of applicants to be invited. For example, in some rounds of invitation, IRCC has only invited PNP applicants or FST applicants.⁹⁵ The rule of first come, first served no longer applies because of the pooling system thus leading to some uncertainty about whether an applicant will receive an invitation to apply or not.⁹⁶

In terms of the space available for discretionary decision making, it is difficult to compare the old and new systems. The former points system gave the Minister discretion to move the pass mark up and down to

94. See United States of America, The Law Library of Congress, *Points Based Immigration Systems: Canada*, by Tariq Ahmad, (Washington: Library of Congress, 2015), online: <www.loc.gov/law/help/points-based-immigration/canada.php> [perma.cc/V2LP-PLPM].

95. Immigration, Refugees and Citizenship Canada, *Previous Express Entry Ministerial Instructions*, online: <www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/ministerial-instructions/previous-express-entry-ministerial-instructions.html> [perma.cc/KP6P-CH8D]. See, e.g., MI 63 (26 May 2017) for PNP and MI 76 (1 November 2017). These rounds of invitations are immediately visible because the rank for PNPs is far above 600 points, and the rank for FSTs is far below 400 points. The rounds of invitation that pull all categories tend to converge around 450 points.

96. Richard Kurland, “Express entry immigration point system revealed before Jan.1 launch” *CBC News* (2 December 2014), online: <www.cbc.ca/news/politics/express-entry-immigration-points-system-revealed-before-jan-1-launch-1.2852922> [perma.cc/TW76-YDUM].

calibrate the numbers and qualities of skilled immigrants.⁹⁷ The room for discretion was primarily in the interpretation and application of the points criteria. Express Entry, meanwhile, retains that discretion in administering the points criteria of the regulatory points system and of the CRS points system, and it adds another portal of discretion in its capacity to control the parameters of the invitation stage. At this stage, IRCC decides the timing of the rounds, the general or specific nature of the rounds, the pass mark set for each round, and the number of invitations issued in a round. In practice, the exercise of this discretion has meant that the rounds do not reach very deep into the pool. In both the old and new systems, immigration officers have the discretion to substitute their evaluation for skilled worker points criteria regarding the likelihood to “become economically established in Canada.”⁹⁸

In its first incarnation, with both job offers and provincial nominations worth 600 CRS points, the Express Entry system was a clear shift toward the market-oriented, demand-driven model of economic immigration.⁹⁹ The 600 points directly tied employers and provinces and territories to immigration selection results. The outcome, acknowledged in an IRCC report, was that candidates with low core CRS scores but a job offer or nomination in hand shot to the top of the rankings, past candidates higher core CRS scores but without a job offer or provincial nomination.¹⁰⁰ Since the reweighting of the job offer in 2016, however, Express Entry seems to be more of a hybrid model, maintaining the human capital factors in both the regulatory points system required to enter the pool and in the CRS points system required to receive an invitation to apply, while creating institutionalized space for employers and provinces and territories to fill labour market needs.¹⁰¹ However, this picture is further complicated by the move to two-step immigration in Canada. This move multiplied the nodes of transition for temporary workers to become permanent residents through programs such as CEC. Express Entry internalized this policy preference by allocating CRS points for Canadian work experience, post-secondary education in Canada, and a job offer. Here, if an applicant is already present in Canada as a worker or a student, s/he can maximize her

97. See *IRPR*, *supra* note 43, s 76(2).

98. *Ibid*, s 76(3).

99. Koslowski, *supra* note 15.

100. EE Year-End Report 2015, *supra* note 72 (two-thirds of invited candidates with job offers had core CRS scores of 300 or less).

101. Immigration, Refugees and Citizenship Canada, *Express Entry Improvements: Fall 2016*, (Ottawa: IRCC, 2016), online: <www.canada.ca/en/immigration-refugees-citizenship/news/2016/11/express-entry-improvements-fall-2016.html> [<https://perma.cc/FF5K-Q5RW>].

CRS points without needing to accumulate as many human capital points. For example, an applicant with two years of post-secondary education, one year of work experience, and the lowest accepted proficiency in an official language could nonetheless pass the regulatory points threshold with a job offer (weighted twice, in arranged employment and adaptability). Then, at the CRS stage, that same applicant would benefit from Canadian work experience in the first and third categories and a job offer in the fourth category. Without the Canadian work experience s/he garnered in the temporary stream, it is unlikely that the applicant would have received a job offer, both factors which can be counted in Express Entry.

Applying the disaggregated neo-corporatist criteria, the shift toward the neo-corporatist model is visible. It is still the immigrant who triggers the immigration process by creating an online profile, but other vectors have shifted. In cases where the employer or province or territory is willing to vouch for the immigrant through a job offer or a nomination, they effectively pull the applicant out of the pool. This is most clearly the case for provinces and territories, who can bestow applicants with 600 points, and it is at least partly the case for employers, who can bestow applicants with 50 or 200 points, depending on the skill classification of the job. Moreover, the regulatory selection criteria are revised in the CRS and reweighted in alignment with the labour market factors. These selection criteria are set by the federal government, although they build in provincial and territorial selection delegation, and they are adjusted in response to input from various interests, including business interests.¹⁰²

III. *The deeper changes wrought by Express Entry*

1. *A shift in legal instrument: Ministerial Instructions and the lawmaking process*

The *IRPA* is framework legislation. This means that it does not prescribe detailed programs and procedures, leaving those details to the regulations. Regulations are legally binding.¹⁰³ They must be authorized by statute:

102. See Canadian Chamber of Commerce, “Immigration for a Competitive Canada: Why Highly Skilled International Talent Is at Risk” (The Canadian Chamber of Commerce, January 2016), online (pdf): <www.chamber.ca/download.aspx?t=0&pid=f6479846-2dba-e511-bb93-005056a00b05> [perma.cc/C236-MALJ] [Canadian Chamber of Commerce]. The report calls for an end to the Labour Market Impact Assessment requirement for job offers and then note November 2016 changes to job offer requirements, removing the LMIA requirement for some categories of workers already in Canada.

103. Andrew Green, “Delegation and Consultation: How the Administrative State Functions and the Importance of Rules” in Colleen M Flood & Lorne Sossin, eds, *Administrative Law in Context*, 3rd ed (Toronto: Edmond Montgomery, 2017) 307 at 309; John Mark Keyes, *Executive Legislation*, 2nd ed (Toronto: Lexis Nexis, 2010) at 35.

section 5(1) of the *IRPA* delegates to the Governor-in-Council the authority to make regulations about matters contained in or referred to in the Act. Regulation making is a rigorous process that involves multiple steps before regulations are realized. Some immigration regulations are subjected to an additional layer of parliamentary scrutiny. They must be tabled in the Senate and House of Commons and referred to their respective committees.¹⁰⁴ The entire Express Entry regime was promulgated under Ministerial Instructions and continues to run biweekly draws under their guise. Ministerial Instructions, however, are not regulations. They are not even statutory instruments.¹⁰⁵ This section explores the nature of Ministerial Instructions, their democratic shortcomings, and the genealogy of their rise to prominence.

The nature of Ministerial Instructions is unclear. The provenance of Ministerial Instructions in the immigration context suggests their initial character as soft law. Section 93 of the *IRPA* refers to guidelines and instructions in the same breath, presumably as similar types of soft law instruments. Soft law is not “directly legally binding” and includes policies and guidelines.¹⁰⁶ It permits flexibility and speed.¹⁰⁷ And yet the Express Entry regime does not resemble these soft law categories in either form or function. Unlike guidelines, Ministerial Instructions do not assist decision-makers in their application of legal criteria, contained in the statute or regulations, to individuals.¹⁰⁸ Instead, they establish that legal criteria. They seem rather akin to the “guideline” invalidated by the Ontario Court of Appeal in *Ainsley Financial Corp. v. Ontario Securities Commission*, where Doherty J. noted that the instrument set out “a minutely detailed regime that reads like a statute or regulation.”¹⁰⁹ Ministerial Instructions under the *IRPA* are like statutory and regulatory instruments without any of the usual baggage of democratic lawmaking.¹¹⁰ They immediately have the force of law, but they do not require advance notice, consultation, or

104. See, e.g., *IRPA*, *supra* note 57, ss 17, 32, 53, 61, 87.2, 102, 116, 150, 150(1). See also Canada, *Immigration Policy Primer*, by Sandra Elgersma, Pub No 2015-42-E (Ottawa: Library of Parliament, 16 Nov 2015), online (pdf): <lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/InBriefs/PDF/2015-42-e.pdf> [perma.cc/P8KF-BPN4] [Elgersma].

105. See *IRPA*, *supra* note 57, s 93.

106. See Green, *supra* note 103 at 310.

107. *Ibid* at 311-313.

108. See Lorne Sossin & Charles W Smith, “Hard Choices and Soft Law: Ethical Codes, Policy Guidelines and the Role of the Courts in Regulating Government” (2003) 40 *Alb L Rev* 867 at 868-869 (for a description of ‘soft law’ and ‘hard law’).

109. *Ainsley Financial Corp. v Ontario Securities Commission*, (1994) 121 *DLR* (4th) 79, at para 19, 21 *OR* (3d) 104.

110. See *IRPA*, *supra* note 57, s 9 (Ministerial Instructions are not statutory instruments for the purposes of the *Statutory Instruments Act*).

analysis.¹¹¹ There is no requirement of pre-publication and no discussion in the broader public sphere with interested parties. Audrey Macklin explains:

Ministerial Instructions are a peculiar instrument. They seem not to constitute law in the way that is conventionally understood. They do not exist under the Statutory Instruments Act; they are specifically exempted from it. They appear to give the minister the authority to make law by decree.¹¹²

There are several limits built into the regulatory process to protect democratic lawmaking that do not apply to Ministerial Instructions. In the *IRPA*, the regulation-making power is delegated from the legislature to the Cabinet through the Governor-in-Council. The resulting regulations are delegated—or subordinate—legislation, considered inferior to statutes.¹¹³ Their *raison d'être* is to allow those who implement the statute to adjust the rules over time to take account of new or unforeseen circumstances or changes in policy direction. Although regulations do not always or necessarily require notice or consultation, by virtue of both the *Statutory Instruments Act* and the *Cabinet Directive on Regulatory Management*, they are pre-published in the *Canada Gazette, Part I*, subjected to analysis in a Regulatory Impact Analysis Statement (RIAS), commented upon, revised, approved by the Governor-in-Council, and finally published in the *Canada Gazette, Part II*.¹¹⁴

By contrast, Ministerial Instructions must be published on the IRCC website, and a subset of them must also be published in the *Canada Gazette*.¹¹⁵ Neither of these publication requirements permits comment, revision, or effective oversight. Macklin identifies the larger concern this raises: the ability of Ministerial Instructions—themselves not law—to overrule prior law.¹¹⁶ To date, Ministerial Instructions have been used to triage and revise application criteria, terminate applications, and suspend some immigration classes while creating new ones. In effect, these

111. See Sharryn J Aiken et al, eds, *Immigration & Refugee Law: Cases, Materials, and Commentary*, 2nd ed (Toronto: Edmond Montgomery, 2015) at 178; *IRPA*, *supra* note 57, s 2(2) (force of law).

112. Senate, *Proceedings of the Standing Committee on Legal and Constitutional Affairs*, 41st Parl, 1st Sess, No 12 (20 February 2012) at 12:47 (Audrey Macklin), online (pdf): <sencanada.ca/Content/SEN/Committee/411/LCJC/pdf/12issue.pdf> [perma.cc/7Q5U-ETA3] [Standing Committee].

113. See Craig Forcese et al, eds, *Public Law: Cases, Commentary, and Analysis*, 3rd ed (Toronto: Edmond Montgomery, 2015) at 299.

114. *Ibid* at 301; Treasury Board of Canada Secretariat, *Guide to the Federal Regulatory Development Process* (Ottawa: TBCS, 17 April 2014), online: <www.canada.ca/en/treasury-board-secretariat/services/federal-regulatory-management/guidelines-tools/guide-federal-regulatory-development-process.html> [perma.cc/Z8G2-HYCU].

115. *IRPA*, *supra* note 57, ss 10(3), (4).

116. See Standing Committee, *supra* note 112 at 12:60, 12:49, 12:58 (Audrey Macklin).

instructions eviscerate prior legal entitlements and “even overrule what the act and regulations state as a matter of law.”¹¹⁷ Effectively, the *IRPA* and its regulations are revised and overruled through Ministerial Instructions, which are not subject to public scrutiny, Parliamentary accountability, or procedural formality safeguards.¹¹⁸

By using soft law instructions as regulatory (or even statutory) creatures, the federal government avoided any advisory or public participation in regime changes.¹¹⁹ One result of the categorical division between soft law and regulations is that it ensures impact analysis and notice and consultation procedures for regulatory changes. By amending legislation under the guise of a guideline-type instrument, Ministerial Instructions curtail democratic dialogue as much as institutional dialogue. Where proposed statutory amendments or regulations are authorized by the Governor-in-Council, they would be subjected to parliamentary scrutiny, thus ensuring a check on executive lawmaking. The use of Ministerial Instructions shifts the locus of immigration lawmaking authority, placing it in the hands of individual Cabinet ministers.¹²⁰ In a Standing Senate Committee discussion about the use of Ministerial Instructions to make law, Senator Fraser agreed that “[t]hat is particularly interesting to parliamentarians because Parliament does have the right to scrutinize and indeed overturn regulations, but not Ministerial Instructions. It is fascinating.”¹²¹ The characterization of Ministerial Instructions as non-statutory instruments should raise concerns, not only about the enhanced authority of the executive, but also about the result: entire divisions of immigration law have been changed outside of the generally accepted lawmaking process.

The genealogy of the appearance of Ministerial Instructions in the *IRPA* is informative. The *IRPA* now contains ten substantive mentions of Ministerial Instructions: seven subject provisions that authorize the Minister to issue instructions and three provisions about the nature and

117. *Ibid* at 12:49 (Audrey Macklin).

118. See Sossin & Smith, *supra* note 108 at 887. There are some safeguards built in the *IRPA* provisions governing business immigrants in section 14.1, including a cap of 2,750 per year and a 5-year time limit, but these provisions pertain to a small sub-category of business immigrants (formerly, investors, entrepreneurs, and self-employed persons; now start-up visa holders and self-employed persons). The investor pilot program has been discontinued, and the start-up visa program has been moved into the regulations (see *IRPA*, *supra* note 57, ss 98.01-98.09).

119. France Houle & Geneviève Saint-Laurent, “Privatisations du processus de sélection au Canada: retour vers des pratiques discriminatoires” in Adèle Garnier, Loïc Pignolo & Geneviève Saint-Laurent, eds, *Gérer les migrations face aux défis identitaires et sécuritaires* (Genève: Université de Genève: 2018) 13 at 20-21.

120. See Carver, *supra* note 67 at 224.

121. Standing Committee, *supra* note 112 at 12:50 (Senator Fraser).

character of instructions.¹²² Tracing the amendments related to Ministerial Instructions reveals a government concertedly creating a less cumbersome regulatory power. While the form or modality of Ministerial Instructions is not new, the scale and depth of their deployment since 2008 deserves scrutiny. As noted above, the concept of and authority for Ministerial Instructions existed in the original promulgation of the *IRPA*. Section 93 stated that:

Instructions given by the Minister or the Minister of Employment and Social Development under this Act and guidelines issued by the Chairperson under paragraph 159(1)(h) are not statutory instruments for the purposes of the *Statutory Instruments Act*.¹²³

The use of such instructions was contemplated in three early, discrete provisions related to family sponsorship, examinations, and temporary resident permits.¹²⁴ These three provisions simply required officers to apply regulations in accordance with any such instructions. Based on these early provisions, it seems likely that instructions were intended to be used and considered in a similar manner to guidelines.¹²⁵ Guidelines, however, are not law; they are interpretative guides for immigration officers, but they are not binding.¹²⁶ As Peter Carver notes, “[i]n form, Ministerial Instructions have the appearance of guidelines, principally in that they are addressed to civil servants, not to the public generally, and describe how applications are to be processed, a seemingly internal concern.”¹²⁷

In the years subsequent, the government changed the architecture of the *IRPA* through Ministerial Instructions and turned them into different legal animals. On the one hand, the government amended the *IRPA* to add more weight to the burgeoning regime of Ministerial Instructions. It enacted section 94(2), requiring specific reporting for Ministerial Instructions in the annual report to Parliament and section 2(2) which redefined “this

122. *IRPA*, *supra* note 57, ss 10.3, 13(4), 14.1, 15(4), 24(3), 30, 87.3(3) (authorizing Ministerial Instructions), and ss 2(2), 93, 94(2) (referring to the nature and character of Ministerial Instructions).

123. *Ibid*, s 93.

124. See *IRPA*, *supra* note 57, ss 13(4) (sponsorship), 15(4) (examinations), 24(3) (temporary resident permits).

125. See, e.g., *ibid*, s 93 (where “instructions” appear with “guidelines” to mean non-statutory instruments).

126. See *Baker v Canada*, [1999] 2 SCR 817 at para 72, 174 DLR (4th) 193 (“the guidelines are a useful indicator of what constitutes a reasonable interpretation of the power conferred by the section”), affirmed in *Agraira v Canada*, 2013 SCC 36 at para 85. See also *Kanthasamy v Canada*, 2015 SCC 61 at para 32.

127. Carver, *supra* note 67 at 226.

Act” to include “regulations and instructions under s. 14.1(1).”¹²⁸ This latter redefinition in 2012, in particular, merged Ministerial Instructions about business immigration (promulgated under section 14.1) into the Act, effectively making them part of the statute. On the other hand, the government set about drafting and publishing Ministerial Instructions to change the processing criteria and eligibility classes for economic immigrants, first amending the statute to establish the authority to do so, then passing a raft of instructions. Through new sections 10.3, 14.1, 30(1.2), and 87.3 of the *IRPA*, the foundation was laid to categorically rewrite economic immigration.

The initial Ministerial Instructions, aimed at clearing the backlog of federal skilled worker applications, turned out to be the harbinger. Section 87.3 set the ambit of Ministerial Instructions broadly so long as they furthered the purpose of “best support[ing] the attainment of the immigration goals established by the Government of Canada.”¹²⁹ Under this ambit, the government paused, narrowed, and capped both federal skilled worker and parental sponsorship applications. These Ministerial Instructions were the first to be tested in the courts and withstood judicial scrutiny,¹³⁰ revealing one remarkable feature of the newly minted statutory authority to issue such instructions: the government’s express effort to insulate decisions made under section 87.3 from judicial review.¹³¹ This preclusion of judicial review added yet another layer to the democratic deficit of Ministerial Instructions, revealing their ability to characterize decisions made under their authority as unreviewable: “the fact that an application is retained, returned or otherwise disposed of does not constitute a decision not to issue the visa or other document, or grant the status or exemption, in relation to which the application or request is made.”¹³²

Following quickly on the heels of the federal skilled worker culling, the Minister eliminated two business classes and created two new ones, rewrote the points system into the Express Entry regime, and added public

128. Section 14.1 refers to the Express Entry regime; section 94(2) was enacted 2008-06-18; section 2(2) was enacted 2012-06-29; plus s 92(1.1) said that an instruction may incorporate any material regardless of source (2012-06-29).

129. *IRPA*, *supra* note 57, s 87.3(2),(3)

130. See *Liang v Canada (Minister of Citizenship & Immigration)*, 2012 FC 758; *Esensoy v Canada (Minister of Citizenship & Immigration)*, 2012 FC 1343; *Lukaj v Canada (Minister of Citizenship & Immigration)*, 2013 FC 8.

131. See *IRPA*, *supra* note 57, s 87.3(5); Mario Bellissimo, “Law-Making Innovation in the Canadian and International Immigration Context” (3 May 2013) at 1, online (pdf): *Canadian Bar Association* <www.cba.org/CBA/cle/PDF/IMM13_paper_bellissimo.pdf> [perma.cc/3PY6-EG3P].

132. *IRPA*, *supra* note 57, s 87.3(5).

policy considerations to work permit decisions.¹³³ Section 10.3 of the *IRPA* is the basis for the Express Entry instructions. The whole Express Entry system is governed by and through Ministerial Instructions, from its selection criteria to its processing protocols to each round of invitations.¹³⁴ These instructions pertain to the economic immigration programs included in Express Entry and their eligibility criteria, the electronic submission process, the ranking criteria, information on draws, time limits, and manner of notification. Every two weeks or so, the minister publicly posts the pass mark and invites applicants to apply. The entire Express Entry system depends on this modality, both its infrastructure and its ongoing operation.

The publication of these instructions might intimate that the process is transparent. However, the same deficit applies here with respect to the overhaul of the points system: there was no opportunity to comment nor any parliamentary scrutiny. Moreover, while it is true that the instructions publicize the number of rounds and the nature of the invitations to apply, that publication requirement is a post-decision obligation in an electronic setting. Under the prior points system, refused applicants could apply for judicial review. Now, the minister electronically determines whether an applicant is eligible or not based on factual criteria with “little or no application of human discretion.”¹³⁵ Carver notes that it is “difficult to conceive how individuals who fail to meet eligibility under this highly contingent and incremental system could obtain judicial review.”¹³⁶ Under Express Entry, the Minister sets the pass mark internally, publishes the pass mark, and then extends invitations to apply. The precise criteria that mattered for the decision remain unknown, in part because the assessment is relative and based on the particular constellation of points held by other applicants. Under the former points system, if the decision maker found that you did not meet the threshold, s/he would indicate the basis for that —e.g., that the points allocated for education were incorrect because a degree was not obtained. There is ample case law interpreting the points

133. On public policy considerations, see Ministerial Instructions Respecting Labour Market Opinions and Ministerial Instruction Respecting Revocation of Work Permits, (2013) C Gaz I, Vol. 147, No. 52, both online: <<http://www.gazette.gc.ca/rp-pr/p1/2013/2013-12-28/html/notice-avis-eng.html>>. On business classes, see Ministerial Instructions Respecting the Start-up Business Class, (2013) C Gaz I, Vol. 147, No. 52, online: <<http://gazette.gc.ca/rp-pr/p1/2013/2013-03-30/html/notice-avis-eng.html>>; see also Ministerial Instructions Respecting the Immigrant Investor Capital Class, (2015) C Gaz I, Vol. 149, No. 4, online: <<http://www.gazette.gc.ca/rp-pr/p1/2015/2015-01-24/html/notice-avis-eng.html#ne1>>. On Express Entry, see *supra* note 91.

134. See *IRPA*, *supra* note 57, Division 0.1, ss 10.1-10.4, added in 2013 to create the Express Entry system and make permanent resident applications conditional upon receipt of invitation.

135. Carver, *supra* note 67 at 229.

136. *Ibid* at 230.

allocations from the regulations. Now, the process of issuing rounds of invitation under Ministerial Instructions reduces the ability to review those interpretations. In other words, while the Express Entry instructions are not expressly shielded from review, their nature means that the points of discretionary decision making are more difficult to locate and judicially review.

Although Ministerial Instructions may be troubling from the perspectives of democracy and the rule of law, they nonetheless fit into a longer narrative about “the systematic submersion of the migration regime beneath the source of legislative text, down to less accessible regulatory subtext and ultimately to low visibility discretionary counter-text...”¹³⁷ Historically, large portions of Canada’s racist immigration laws were made “in the form of ‘orders-in-council,’ legal declarations of the cabinet approved by the Governor General” specifically to maintain flexibility, discretion, and to avoid controversy.¹³⁸ In terms of the relationship between economy and community that animates immigration law, Ministerial Instructions reveal the troubling use of intended soft law instruments for decidedly hard law purposes, thus shortcircuiting the very community that immigration law tried to build through the points system. For now, Express Entry changes who may be admitted to the economy and the community without any public scrutiny of who should enter or on what terms.

2. *A shift in decision maker: third parties and selection authority*

The Express Entry regime changes who is in charge of selecting economic immigrants. The human capital model had placed the federal government in charge of selection. Under that model, the role of the state in border control and immigration generally was thus coincident with the state’s role in economic immigration. The philosophy of the human capital model was premised on long-term, broad-based skills and flexibility.¹³⁹ The regulatory points system weighted the job offer as part of the calculus, but it was not primarily concerned with meeting immediate labour market or regional needs into its processes. Express Entry effectively channels labour market needs through employers and provinces and territories, granting them some measure of selection authority. This is more obvious

137. Audrey Macklin, “Historicizing Narratives of Arrival” in Hester Lessard, Rebecca Johnson & Jeremy Webber, eds, *Storied Communities* (Seattle: University of Washington Press: 2010) at 52.

138. See Fitzgerald & Cook-Martin, *supra* note 3 chapter on Canada at 147-148, 176. For example, the ban on “any immigrant of any Asiatic race” and discriminatory naturalization requirements were contained in Orders in Council. See *Regulations re landing in Canada of Asiatics*, OIC 1923-0182, (1923) RG2 A-1-d, 2819; PC 1378 of 17 June 1931, respectively. The continuous journey requirement was also contained in an Order in Council, see PC 24 of 7 January 1914.

139. See Abu-Laban & Gabriel, *supra* note 54 at 80.

with nominations, which virtually guarantee an invitation to apply, but it is also true of job offers, especially those for senior management occupations, which will tip the balance. The Express Entry model shifts economic immigration in Canada toward the neo-corporatist model. This is a shift not only in who receives invitations to apply based on labour market factors, but also a shift in values and priorities. The neo-corporatist model is looking for fully-formed, labour market ready immigrants.¹⁴⁰ What is lost is sustained attention to the capacity to adapt to new environments and other characteristics which facilitate broad-based integration. Indeed, one potential problem with this delegation is that third parties may not be as concerned with broader settlement and integration issues.¹⁴¹

a. *The view from the private sector: employers*

In the Express Entry system, the maximum core CRS score (for the first three categories) is 600 points. Under the regulatory points system, applicants receive a maximum of 15 points for arranged employment. Under the initial Express Entry system, applicants received 600 CRS points for a job offer, which was generally sufficient to trigger an invitation to apply for permanent residence. This effectively removed state discretion with respect to those applications, making the CRS core human capital points score irrelevant, and delegated selection to the private sector.¹⁴² Under the current Express Entry system, applicants receive 200 CRS points for a job offer in NOC 00 fields (senior management), and 50 CRS points for a job offer in NOC 0, A, or B fields (management, professional, and skilled occupations).¹⁴³ The 2016 modifications have significantly attenuated the role of employer interests and job offers in the Express Entry system.

The rationale behind the early allocation of 600 points was to “ensure employers’ needs are met.”¹⁴⁴ IRCC explained:

Express Entry facilitates a more direct employer role in the immigration process. Employers may connect with foreign nationals through recruitment techniques such as private job boards, recruiters, or job fairs and they can give candidates a job offer that will elevate a candidate’s ranking.¹⁴⁵

140. See, e.g., Mary Crock, “Contract or Compact: Skilled Migration and the Dictates of Politics and Ideology” (2001) 16:1 *Georgetown Immigration LJ* 133 (describing the Australian system).

141. Note that Manitoba and British Columbia had settlement responsibilities until the federal government took them back in 2010. Quebec is the only province that is still responsible for settlement services. See Mireille Paquet, “The Federalization of Immigration and Integration in Canada” (2014) 47:3 *Can J Political Science* 519. See also Davide Strazzari, “Immigration and Federalism in Canada: beyond Quebec Exceptionalism” (2017) 9:3 *Perspectives on Federalism* 56 at E-71.

142. Houle & Saint-Laurent, *supra* note 119 at 23.

143. As of 19 November 2016. See EE Year-End Report 2016, *supra* note 12.

144. EE Year-End Report 2015, *supra* note 72; EE Q & A, *supra* note 73.

145. EE Year-End Report 2016, *supra* note 12 at 12.

In most cases, employers had to obtain a Labour Market Impact Assessment (LMIA) indicating that there are no Canadian citizens or permanent residents available for the job.¹⁴⁶ This hurdle was particularly challenging in the initial phase when the aim of Express Entry was to directly fill labour market needs by giving employers 600 points for the extension of a job offer. The bargain struck by Express Entry was that employers could use the portal to hire job candidates because they would be approved and admitted within six months. The LMIA process added many months of processing in an express system designed to fill immediate labour market needs. In 2016, the government removed the LMIA requirement for some categories of workers already in Canada, but the requirement is still subject to general criticism “because its logic is based on the protection of certain temporary jobs....It is not designed to measure long-term labour demand.”¹⁴⁷

In 2015, the total number of invitations to apply for permanent residence was 31,063, and 60% of the applicants invited to apply for permanent residence had CRS scores above 600 points.¹⁴⁸ Those applicants necessarily relied on either a job offer or a provincial nomination to obtain scores above 600. Indeed, five of the 23 rounds of invitations pulled only applicants with CRS scores above 600 points. This was a significant amount of the total number of economic permanent residents, and it meant that the employer or province could significantly tilt the balance where the applicant has a low “core CRS score” with few human capital attributes. The effects of the 600 point allocations were visible in the occupational spread of the first cohort of invitees: the largest group of invited candidates were food service supervisors and cooks (NOC 63)—likely to have lower core CRS scores coupled with valid job offers—followed by information technology professionals (NOC 21).¹⁴⁹ A significant number of these applicants were already in Canada on a temporary basis.¹⁵⁰ In these early days, Express Entry was pulling more lower skilled workers than the former points system because of the 600 points for job offers and provincial nominations, combined with the ability to maximize points for

146. This opinion is rendered by Employment and Social Development Canada.

147. Immigration, Refugees and Citizenship Canada, *Express Entry: Early Observations on November 2016 Improvements* (Ottawa: IRCC, 2016), online: <www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/express-entry-early-observations-november-2016.html> [perma.cc/AUH4-W9N6]. Canadian Chamber of Commerce, *supra* note 102 at 8.

148. See EE Year-End Report 2015, *supra* note 72.

149. *Ibid.*

150. Immigration, Refugees and Citizenship Canada, “2018 Annual Report to Parliament on Immigration” (Ottawa: IRCC, 2019) at 15, online (pdf): <www.canada.ca/content/dam/ircc/migration/ircc/english/pdf/pub/annual-report-2018.pdf> [perma.cc/QGE6-964H].

applicants already in Canada, who could garner points for Canadian work experience.

For 2016, IRCC disaggregated the numbers: applicants with job offers made up 34% of the annual extended invitations, and provincial nominees made up 26% of invitations to apply. The total number of invitations remained low at 33,782.¹⁵¹ The top two occupations reversed in 2016: candidates working as information technology professionals (NOC 21) were the largest group of invited candidates, followed by cooks and food service supervisors (NOC 63). Over the course of that year, the invitation rounds began to pull candidates in NOC 11, 21, and 40 (professionals and professors), evidencing a shift toward higher skilled workers.¹⁵² This trend deepened further with the reduction of CRS points for a job offer in November of that year. In 2017, applicants with job offers made up 9% of invitees, while provincial nominees made up 10%, out of a much larger total of 86,022 invitations to apply.¹⁵³ The occupational mix remained stable, with information technology professionals (NOC 21) making the largest three groups of invited candidates.

In terms of the distribution of source countries, in 2015, the top six countries of citizenship were: India, Philippines, China, United Kingdom, Ireland, and the United States. In 2016, the top six countries remained the same but shifted spots.¹⁵⁴ In 2017, the Philippines and Ireland fell out of the top six, replaced by Nigeria and Pakistan.¹⁵⁵ Perhaps most significantly, the main country of residence for invited candidates in all three years was Canada because of the high numbers of temporary foreign workers and students who wished to settle permanently.¹⁵⁶ This confirms the advantages enjoyed by candidates who are already in Canada. Instead of their assessment resting on raw language or education criteria, a large part of it shifts to the short-term assessment of whether the candidate is already plugged into the Canadian economy.

The CRS threshold has evened out over time, coming to settle between 450-500.¹⁵⁷ Although the reweighting of the job offer reduces the role of the labour market in the Express Entry system, it continues

151. See EE Year-End Report 2016, *supra* note 12 at 9.

152. *Ibid* at 13.

153. Immigration, Refugees and Citizenship Canada, “Express Entry Year-End Report 2017” (Ottawa: IRCC, 2018), online (pdf): <www.canada.ca/content/dam/ircc/documents/pdf/english/pub/express-entry-year-end-report-2017.pdf> [perma.cc/NF52-H3DP] [EE Year-End Report 2017].

154. See EE Year-End Report 2016, *supra* note 12 at 14.

155. See EE Year-End Report 2017, *supra* note 153 at 13.

156. See EE Year-End Report 2016, *supra* note 12 at 14.

157. See *ibid*. A review of the 2017 rounds of invitations shows that they converge around 430 CRS points, with exceptions for PNP or FST only rounds.

to permeate selection. Provincial nominee programs internalize labour market functions since they often extend nominations based on job offers or regional labour market needs. There are two potential concerns with this kind of delegation, especially when it is heavily weighted. The state is tasked with the full gamut of objectives in the *IRPA*, from protecting rights to reunifying families.¹⁵⁸ One concern is the potentially divergent interests of employers and/or provinces and territories and the federal government. As Naomi Albiom explains: “Provinces, employers, universities and colleges do not have the national interest as their mandate or objective.... [They are not] in the business of selecting individuals based on their long-term potential to contribute to Canada as citizens.”¹⁵⁹ This meshes with the analysis, above, about what is captured by the human capital metric. The other concern is about private sector discrimination in selection. France Houle and Geneviève Saint-Laurent worry that employers will prefer to hire immigrants with familiar educational credentials and work experience, leading to the exclusion of immigrants from the Global South.¹⁶⁰ This concern that delegated interests may not adhere to established standards of equal treatment and may become “laboratories of bigotry” is echoed in immigration federalism scholarship about the limited appeal options for refused provincial and territorial nominees.¹⁶¹

b. *The view from federalism: provinces and territories*

The place of provinces and territories in Express Entry contemplates their unique constitutional and historical role in immigration matters. Under the 1867 *Constitution Act*, immigration is a concurrent jurisdiction subject to federal paramountcy.¹⁶² Despite their role in immigration as colonies, the provinces were generally content to let the federal government take the reins after Confederation, with mild interruptions in this jurisdictional stasis.¹⁶³ Quebec revived immigration federalism in the 1960s with its claims for recognition as a distinct society, which led to the conclusion of several

158. *IRPA*, *supra* note 57, s 3.

159. Naomi Albiom, *Adjusting the Balance: Fixing Canada's Economic Immigration Policies* (Toronto: Maytree Foundation, 2012) at 50.

160. Houle & Saint-Laurent, *supra* note 119 at 22-26.

161. Sasha Baglay & Delphine Nakache, eds, *Immigration Regulation in Federal States: Challenges and Responses in Comparative Perspective* (New York: Springer Publishing, 2014) at 7.

162. *Constitution Act*, *supra* note 85, s 9 (see also s 91(25): “Naturalization of Aliens”).

163. See Strazzari, *supra* note 141 at 63-64, noting that this reign was interrupted by British Columbia's anti-Chinese immigration laws at the turn of the century.

intergovernmental agreements about immigration.¹⁶⁴ This eventually precipitated provincial demand for immigration jurisdiction-sharing agreements. In the mid-1990s, the federal government developed the PNP to allow other provinces and territories to identify permanent resident nominees using their own selection criteria.¹⁶⁵ PNPs allow the provinces to identify limited numbers of economic immigrants, thereby preserving more federal control than under the arrangement with Quebec.¹⁶⁶ Between 1998 and 2009, every province and territory except Nunavut signed a provincial nominee agreement.¹⁶⁷ In the last two decades, immigration has been rapidly decentralized with provincial and territorial authorities exercising significant decision-making power in the selection of immigrants, in line with trends in several other federal states.¹⁶⁸

The division of responsibilities lies along selection and inadmissibility lines: the provincial governments are responsible for designing PNP streams and criteria as well as recruiting, selecting, and nominating immigrants.¹⁶⁹ The federal government has the final say in the selection of nominees and is responsible for inadmissibility screening.¹⁷⁰ The federal government also has authority to cap the PNP numbers as it sees fit.¹⁷¹ The provincial and territorial roles in immigration selection mirror the rationales for federalism more generally. Immigration selection allows sub-state actors to prioritize their local autonomy and identity, to meet local economic needs, and to enjoy the benefits of subsidiarity. The objectives of these PNP agreements are to address regional particularities and diverse economic and demographic needs and to manage particular newcomer settlement patterns. For example, Quebec criteria favours French speaking

164. See *Lang-Cloutier Agreement* (1971); *Andras-Bienvenue Agreement* (1975), *Cullen-Couture Agreement* (1978), *Canada-Quebec Accord Relating to Immigration and Temporary Admission of Aliens* (February 5, 1991); Paquet, *supra* note 141 at 530 (discussing the Gagnon-Tremblay-McDougall agreement). Note that these are not, strictly speaking, provincial nomination agreements. Quebec's accords are broader in scope and jurisdiction (selection, reception, integration), and references to them appear separately in the *IRPA*.

165. See F Leslie Seidle, "Canada's Provincial Nominee Immigration Programs: Securing Greater Policy Alignment" (2013) 43 *IRPP Study* at 5.

166. See Keith Banting, "Remaking Immigration: Asymmetric Decentralization and Canadian Federalism" in Herman Bakvis & Grace Skogstad, eds, *Canadian Federalism: Performance, Effectiveness and Legitimacy*, 3rd ed (Ontario: Oxford University Press, 2012) 261; Paquet, *supra* note 141 at 529-532.

167. See Seidle, *supra* note 165 at 5; note: QC is under a different non-PNP arrangement.

168. See Banting, *supra* note 166; See Baglay & Nakache, *supra* note 161 at 3-7.

169. See Seidle, *supra* note 165.

170. The final decision rests with the federal's government's ability to assess a provincial nominee's ability to become economically established: see *IRPR*, *supra* note 43, ss 87(3),(4).

171. See Banting, *supra* note 166.

immigrants, while Manitoba's criteria favours semi-skilled trades.¹⁷² These objectives redouble on each other: when provinces select immigrants based on regional labour market needs, they are indirectly injecting labour market factors into the Express Entry calculus.

The provincial nominee programs are now the second largest source of economic immigration to Canada.¹⁷³ In 2015, provincial nominations made up 13% of the applicants invited for permanent residence under Express Entry.¹⁷⁴ In 2016, provincial nominations totaled 26% of invitations.¹⁷⁵ One of the ways applicants can apply to be considered for the PNPs is through the online Express Entry system, which typically refers back to the base Express Entry categories and requires that applicants fit within one of them. Eligibility for Express Entry, in other words, functions as a kind of floor for provincial selection. For example, British Columbia and Ontario tell potential immigrants that they must qualify for a federal immigration program, and then the provinces apply their own criteria to select nominees from the Express Entry pool.¹⁷⁶ In short, PNPs are both broader than Express Entry—covering immigrants not included in the Express Entry categories—and narrower than Express Entry, requiring immigrants to fit within the Express Entry categories and then further winnowing the pool from there. It depends on the application stream. This means that the PNP category in the Express Entry system is not an independent provincial category but rather a jurisdictional amalgam: the federal government sets the minimum requirements, the provinces make the ultimate selection decisions under the PNP category, and then the federal government processes the PNP applications for admissibility. This is different from other, non-Express Entry PNP categories, for which the federal government does not set selection criteria and which function internally to the province.

In terms of the historical arc, Express Entry is part of a return to fuller jurisdictional concurrency. A decade after the creation of the PNPs

172. See Sasha Baglay, "Provincial Nominee Programs: A Note on Policy Implications and Future Research Needs" (2012) 13 *Int'l Migration and Integration* 121 at 122, 127-129.

173. See Citizenship and Immigration Canada, *Fact Sheet: Provincial Nominee Program* (Ottawa: Citizenship and Immigration Canada, February 2012), online (pdf): <www.cic.gc.ca/english/pdf/pub/pnp-ppp-eng.pdf> [perma.cc/337K-X3LF]. It is important to note that initial PNP uptake is partially attributable to historically long backlogs for federal skilled worker applications.

174. See EE Year-End Report 2015, *supra* note 72.

175. See EE Year-End Report 2016, *supra* note 12 at 9.

176. See BC PNP: <www.welcomebc.ca/Immigrate-to-B-C/B-C-Provincial-Nominee-Program/BC-PNP-pathways> [perma.cc/R648-HZS5]; ON PNP: <www.ontario.ca/page/ontario-immigrant-nominee-program-oinp> [perma.cc/6XM3-38PX]. See also AB PNP: <www.alberta.ca/ainp-selection-criteria.aspx#toc-2> [perma.cc/HPJ6-UTAN]; NS PNP: <[novascotia-immigration.com/move-here/nova-scotia-demand-express-entry/](http://novascotiaimmigration.com/move-here/nova-scotia-demand-express-entry/)> [perma.cc/6ZVQ-F8KW].

in the mid-1990s, the federal government pulled back from devolving immigration powers to the provinces. In her 2009 report, the Auditor-General noted that the lack of a common policy framework required attention and that “[a]t the time of our audit, [PNPs] included more than 50 different categories, each with its own selection approach and criteria.”¹⁷⁷ The federal government shared these fragmentation concerns—different selection criteria, different provincial identities, different relationships to the federal state, and different settlement and integration infrastructure as well as numbers.¹⁷⁸ That year, the federal government had become so concerned about PNP growth that it capped provincial nominee numbers, introduced some minimum requirements, and urged the provinces to align their programs to national purposes.¹⁷⁹ It also removed responsibility for settlement services in 2010 from the two provinces that had taken them over: British Columbia and Manitoba.¹⁸⁰ F. Leslie Seidle refers to this as the “reassertion of the federal role.”¹⁸¹

Although policy coherence and efficiency concerns continue to dog PNPs, the federal government seems willing to work those out from within a deepening model of concurrency.¹⁸² With the advent of Express Entry in 2015, the federal government institutionalized provincial selection in a federal system. A provincial nomination is now the only attribute that will garner an economic applicant 600 points in the CRS ranking system. This makes federalism—and immigration’s role within it—the last trump in the Express Entry regime. Properly understood, then, the 600 points granted to provincial nominees under Express Entry institutionalizes the concurrent jurisdiction contemplated by section 95 of the *Constitution Act* and sections 8 and 9 of the *IRPA*; it ensures that provincial selection will govern.

There are general concerns about third party selection authority that apply to PNPs, as well as more specific ones. Mireille Paquet notes: “[a]s a mechanism centred on the economy and demography, province building in immigration is not concerned with belonging or identity, as is nation building.”¹⁸³ This indirectly raises a higher order concern about

177. Canada, Auditor General Report, *2009 Fall Report of the Auditor General of Canada* (Ottawa: Office of the Auditor General of Canada, 2009), c 2.

178. See Elgersma, *supra* note 104 at 5. The number of immigrants entering Canada under these programs rose from 2.7% in 2004 to 18.3% in 2014.

179. See Paquet, *supra* note 141 at 540; Seidle, *supra* note 165 at 7; Banting, *supra* note 166.

180. See Strazzari, *supra* note 141 at 72.

181. Seidle, *supra* note 165 at 18.

182. Baglay & Nakache, *supra* note 161 at 7.

183. Paquet, *supra* note 141 at 527, citing JJ Linz, “State Building and Nation Building” (1993) 1 *European Review* 355.

whether immigration subsidiarity can work in Canada. From selection concerns about whether PNPs can pick adaptable, economic immigrants to settlement concerns about whether provinces can keep nominees in the province and provide the necessary integration infrastructure, the issues multiply almost as quickly as the streams of entry. These concerns are real, and the federal government may choose to introduce some baseline criteria. However, with Express Entry, the federal government is implicitly accepting the messy and diverse outcomes of immigration federalism as part of the larger iterative federal project. As Seidle notes, “[a]lthough the concept of immigration federalism includes elements of competitive federalism, it also entails cooperation to achieve shared policy goals.”¹⁸⁴ In a federation marked by cooperative federalism where the constitutional division of powers divides jurisdiction in order to allocate it, section 95—and specifically immigration federalism—stands as a site of concurrent constitutional jurisdiction with competitive *and* cooperative dimensions.

Conclusion: from economy to community and back again

As an inventory management system, Express Entry is a success. It is dynamic, the pool of potential immigrants fills and empties constantly, and there are no applications older than one year because they expire out of the pool. As an immigrant selection system, Express Entry is a mixed bag. It corrects for some of the shortcomings of the old points system: the backlogs and stale applications, the lack of language proficiency, and, perhaps, the poorer labour market outcomes. In exchange, however, it might not dip far enough into the pool of human capital, preferring to prepare skilled immigrants for their first job in Canada rather than their life here. Express Entry marks a devaluing of the human capital model, rather than its demise. However, the mode of this devaluing and the criteria which accomplish it contain deeper significance for economic immigration in Canada.

The use of Ministerial Instructions to promulgate the entire model and all subsequent rounds of invitation as well as the expanded and institutionalized role for provinces and territories and employers in the selection process both portend longer-term changes to the community and the economy that operate in the immigration state. The rationale that the state needs to be competitive and quick to select the best and brightest economic immigrants, that it cannot be constrained by formal legislative procedures or stale applications, understands skilled immigrants as economic inputs rather than people to naturalize. And the move to reduce

184. Seidle, *supra* note 165 at 21.

the human capital part of the points calculation by prioritizing labour market demands (whether expressed through the job offer or the provincial nomination) heightens the tension between economy and community.

The problem with this model of economic immigration is that it denies the longevity of membership when it is making the selection decision. It hides the act of picking and choosing citizens behind the functional economic discourse of picking talent and skill and filling labour market demand. In this way, it contributes to the false sense of separation of the spheres of immigration and citizenship.¹⁸⁵ The former points system had flaws, to be sure, but it sought to prepare economic immigrants to enter the economic community as potential citizens, cognizant that they might change firms and cities, and hopeful that their language, education, and general adaptability would help them adjust. With Express Entry, the space for considering community which was built into the human capital analysis is narrowed. It marks a shift in location—from the federal to the provincial and from the community to the labour market—and in temporality—from long-term citizens to more immediate workers—thus pushing Canada toward the neo-corporatist model of economic immigration. Express Entry swings the pendulum yet again as Canada strives to perfect the method to measure human beings who, by nature, defy measurement.

185. See Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (New York: Cambridge University Press, 2008).