Skilled Worker Selection and the Flawed Lawmaking Process

By

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Abstract

While Canadian immigration law has generally evolved incrementally, the law and policy around skilled immigrant selection has undergone generational shifts. The 1960s and 1970s saw the implementation of a human capital model, whereby immigrants were selected based on long-term adaptability to the labour market. This shift was accompanied by a broad national discussion on immigration. In the past decade, Canada has seen another generational shift away from the human capital model towards an employment-based model, where immigrants are chosen based on immediate employment prospects. The consequences of this shift are profound for our economy and society, but this change has not been accompanied by meaningful consultation or debate. Even more problematic has been the use of various lawmaking tools to limit debate and avoid judicial scrutiny. In contrasting recent changes and the accompanying lawmaking processes with the previous changes, this paper argues for a more comprehensive national conversation on immigration.
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Introduction

Canada’s post-war immigration flow has been dominated by skilled workers. On average, highly skilled workers and their family members have accounted for the majority of immigrants during this period,¹ and since 1995 the economic class has consistently accounted for over half of all immigrants each year.² Today, over 62% are selected in the economic class on the basis of their expected contributions to the Canadian economy.³ However, the beginning of the new millennium has seen a dramatic shift in the way skilled immigrants are selected, with far-reaching implications for Canada.

My intention over the next four chapters is to examine Canada’s rapid shift since the beginning of the 21st century from an overseas-focused “human capital” model of skilled immigrant selection to an in-Canada employment-based model. I will outline the main legal and policy changes that have facilitated and accompanied this shift and explore some of the ideological background behind them. I will then identify some policy challenges that have arisen out of this shift and the lack of coherent legal evolution to accommodate the new reality. Finally, I will explore how it was possible to undergo this shift to the extent that current policies diverge dramatically from those intended by the drafters of the Immigration and Refugee Protection Act, 2002 (IRPA), but with almost no further legislative change and very little explicit public or parliamentary debate. I will argue that the degree of change the system has undergone in the past decade, and is still undergoing, requires a much more coherent legal regime accompanied by a full and open public debate about where Canada’s immigration system should be heading in the 21st century.

In one sense, what I will present is not new; many others have commented before me most of the topics covered in this paper. I hope that my contribution to the literature will be to present a clearer, more holistic picture of the shift of the past decade from a legal perspective, including its historical and legislative context, and to contrast it starkly with the last major shift in skilled immigrant selection in the 1960s and 1970s. I also intend to demonstrate that this shift has in fact consisted of three complementary trends that are mutually reinforcing. Finally, by contrasting the lawmaking process of the past decade with what took place around the last major shift in skilled immigration selection in the 1960s and 1970s, I hope to bring the need for a new national conversation on immigration into renewed focus.

Much of my interpretation of these changes is informed by my own experience practicing immigration law for over a decade and witnessing firsthand the ways in which they have affected who gets into Canada and how. When I entered the practice of immigration law in 2000, my colleagues and I were often approached by individual clients in other countries seeking to immigrate permanently to Canada. By the time I left private practice in 2012, our overseas client base had all but disappeared, to be replaced increasingly by Canadian employers wishing to hire temporary foreign workers, by foreign companies performing temporary contracts in Canada, and by workers and foreign students themselves who were already in Canada and wanted to stay permanently. The changes I witnessed in my own practice in just 12 short years can now be seen in the context of the broad legal evolution that has taken place over almost exactly the same period. I am now stepping back for a moment from my role as counsel and taking a broader view of Canadian immigration law as it relates to skilled immigration selection.

My argument will take the following approach: In the first chapter, I will provide a short history of Canadian immigration law and policy leading up to the adoption of the human capital model of skilled immigrant selection in the 1960s and will show how this model continued to guide Canadian immigration law up to the turn of the millennium, including the drafting of the current legislation and the regulations that initially accompanied it. I will spend some time examining the extensive consultations and debates of the 1960s and 1970s that led to the last major transformation in skilled immigrant selection rules. I will also show that this model was confirmed and in some ways strengthened with the passage of the Immigration and Refugee
Protection Act and its accompanying regulations in 2002. By understanding how the selection system worked for almost 35 years and putting it into historical context, the significance of recent changes will hopefully appear both more obvious and more problematic.

I will then go into some detail in chapter 2 about the major legislative, regulatory and policy changes of the past decade or more that have transformed Canada’s skilled permanent immigrant selection system. I will seek to demonstrate that these changes have led to the effective abandonment of the much-vaulted human capital model as the dominant philosophy guiding selection, not by way of a single coherent decision by through a number of individual and often seemingly disconnected legal and policy innovations.

In chapter 3 I will dig deeper into the various complementary evolutionary trends in the law and policy around skilled immigrant selection and endeavour to expose some of the significant challenges arising from them. The objective here is to demonstrate both how significant the transformation in skilled immigrant selection philosophies has been, and to a certain extent to problematize the new system.

In the final chapter I will focus on the law-making process that has given rise to these changes and will argue that it has been and continues to be inadequate in the context of such important philosophical shifts in immigration law, particularly when seen in the context of previous generational changes in immigration law and the debates that accompanied them. I will call for a much broader national conversation on immigration law involving Parliament, stakeholders and the public in order to generate a new national consensus on the future of immigration to Canada, as well as a return to more formal legal structures for lawmaking around skilled immigrant selection, and a corresponding increase in democratic accountability around the immigration lawmaking process.

While there have been very important changes in many areas of Canadian immigration law in the past 15 years (most particularly in the past five years), I have focused my research in particular on the transition of high-skilled temporary foreign workers to permanent residence. There are several reasons for this focus on high-skill workers. First, economic class immigrants (primarily
skilled workers) and their accompanying family members represent the majority of immigrants overall and have for some time. Second, high-skilled workers have also made up the majority of temporary foreign workers with occupation-specific work permits for almost as long as Canada has had a legal mechanism for bringing in temporary workers. Indeed, with a few exceptions, low-skilled workers were unable to obtain work permits until 2002 with the introduction of the low-skill pilot program. Third, high-skill workers represent the vast majority of temporary foreign workers who are becoming permanent residents, as almost all of the options for transitioning from temporary worker status to permanent residence are limited to high-skilled workers. Fourth, high-skill temporary workers have become an important and growing overall source of immigrants to Canada, with almost 30,000 temporary foreign workers plus accompanying family members becoming permanent residents in 2011, out of a total or approximately 248,000 immigrants that year. Finally, this group appears to have been largely neglected in the scholarship on temporary foreign workers and permanent migration, which for various reasons has focused on low-skill workers; I hope therefore to fill a gap in the literature on temporary foreign workers and permanent immigrant selection.

Since the first permanent European settlements in the early 1600s, Canada has been a nation profoundly influenced by immigrants and immigration, and its population growth continues to be sustained largely by immigration. Because most Canadians are either immigrants or descended from immigrants, immigration law and policy have necessarily been a central part of Canada’s nation-building enterprise throughout its history.

Just as national objectives have changed over the years, the Canadian approach to immigrant selection has evolved very significantly over time. Starting with an agriculturally focused strategy and culminating in the late 1960s and 1970s, Canada’s immigration law transitioned to a

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4 Facts and Figures 2011, supra note 1.
5 Ibid. I note, however, that some argue this balance is now changing. See e.g Jason Foster, “Making Temporary Permanent: The Silent Transformation of the Temporary Foreign Worker Program”, 19 Just Labour (2013) at 28.
6 See chapter 2.
7 See chapter 2.
8 Facts and Figures 2011, supra note 1.
largely skills-based immigration system, at the same time removing most of the discriminatory measures put in place to favour immigrants of certain national and ethnic origins and discourage others.\textsuperscript{11}

A skills-based system was the cornerstone of Canadian immigration law from the 1960s to the dawn of the new millennium, with the federal government selecting the majority of immigrants based on a basket of objectively-measured qualifications including education, skilled work experience, language ability, age and connections to Canada. This is perhaps the classic example of the human capital model.\textsuperscript{12} These criteria would allow Canada to seek highly-skilled workers who would contribute to the growth of the Canadian economy while also fulfilling a demographic imperative brought about by dramatically lower birth rates following the baby boom of the 1950s. This approach has been seen as a model for many other countries, as Australia, Germany, New Zealand and others have sought to emulate it,\textsuperscript{13} and largely as a success by Canadians and their governments: for example, CIC’s 2006 Annual Tracking Survey showed consistent support for the government’s immigration strategy, with little change over the previous nine annual surveys. This survey represents a snapshot in the early days of the recent transition, so may be seen as representative of support of the previous system.\textsuperscript{14}

While skilled immigrants and their immediate families still make up the majority of immigrants to Canada\textsuperscript{15} (in fact, a growing majority), over the past 15 years Canada has undergone significant changes to the legal and policy regimes that determine who is admitted as an immigrant and who is not. From a human capital model of overseas selection of skilled workers who have gained their qualifications and experience in their home countries, Canada has been moving increasingly toward a two-stage immigration system whereby foreign nationals first come to Canada temporarily as workers (generally high-skill workers) or students and then transition to permanent residence. Furthermore, selection has evolved from the human capital

\textsuperscript{11} See generally Kelley and Trebilcock, \textit{supra} note 9, at chapter 9.
\textsuperscript{12} See Shachar, \textit{supra} note 2 at 123.
\textsuperscript{13} Shachar, \textit{supra} note 2 at 129, 131, 140-1.
\textsuperscript{15} Facts and Figures 2011, \textit{supra} note 1.
model to one of selecting immigrants based primarily on arranged employment and related factors. Just as other countries are copying Canada’s human capital model, Canada itself is abandoning it.

I will review data on new permanent residents with the goal of providing a statistical picture of this trend towards the gradual increase in selection from the temporary resident stream, as well as the massive increases in flows of skilled temporary foreign workers and students over the past decade. I will examine the key legal and policy milestones that have accompanied this shift, including the passing of the *Immigration and Refugee Protection Act* in 2002, the creation and expansion of provincial and territorial nominee categories, the advent of the Canadian Experience Class and PhD stream, the reweighting of the points assessment for Federal Skilled Workers to favour those with Canadian work and study experience, and of course the massive growth in the population of temporary foreign workers. I plan to spend some time examining the policy debates behind the introduction of *IRPA* in order to tease out what model of skilled permanent immigrant selection was intended by the drafters and why. I then intend to show that various regulatory and policy changes in the past decade have taken us to a completely different ideological model of immigrant selection from what was intended by the drafters of *IRPA*. Finally, I will provide a critique of the lawmaking process that has accompanied this shift and call for an alternative approach.

**Defining the Human Capital and Employment Models**

I will be discussing the development and eventual undoing of the human capital model at some length in the following chapters. It will therefore be necessary to define clearly what I mean by this term, and its replacement, the employment model.

For the purposes of this paper, I will use this phrase “human capital model” to describe a philosophy of immigrant selection that focuses on the long-term economic and social adaptability of immigrants. Just as an economy seeks to build up financial capital that can be invested in developing industries and services, it equally needs to build up a pool of skilled workers who can adapt to changing economic needs. While not using the same terminology, the
1966 White Paper on Immigration described this selection model as “seek[ing] out people who have the capability to adapt themselves successfully to Canadian economic and social conditions.” Others have named it a “human capital accumulation” formula. Regardless of the name, the concept is the same: immigrants under this model are selected based on their long term adaptability in a changing economy, regardless of their immediate employability.

The human capital model can be distinguished from the other dominant selection model for skilled immigrants, which I will call the employment model. The latter focuses instead on the supply of immediately available job offers for prospective skilled immigrants. Rather than seeking out immigrants who will be adaptable over the long term, the employment model looks for immigrants who will be employed immediately upon their arrival, in some cases regardless of their long term adaptability. In a sense the employment model of skilled immigrant selection is the exact opposite of the human capital model in its focus on immediate outcomes rather than on long term success. The employment model relies on prospective immigrants having specific job offers in place before they are approved for permanent immigration, and therefore mandates the direct involvement of employers in the selection process.

Let us now turn our attention to the history of Canadian immigration law, and to the rise and fall of the human capital model.

16 Canada, Department of Manpower and Immigration, White Paper on Immigration, (Ottawa: Queen’s Printer, 1966) at 5 [White Paper].

In this chapter I will outline the major historical themes in the development of Canadian immigration law since the days of European colonization. My objective in doing so is to put the current legal and policy framework into historical context, with a particular focus on the steps that led to the adoption of the human capital model of skilled immigration selection and the affirmation of that model in the context of the introduction of the current legislation and the regulations that initially accompanied it. It is my intention that this will offer us a better understanding of changes that have occurred in the past decade, which will be discussed in the following chapter.

Canadian immigration legal history can be broken into several broad eras. In many ways, the history of the modern Canadian state is one of immigration, so there is a lot of history to tell; this chapter will therefore necessarily involve a somewhat superficial account, and the dividing lines between these eras will also of course be open to debate. I will endeavour to avoid going too far off topic and will break down this history into five periods, each representing some major themes in the development of Canadian immigration law and each, hopefully, leading us down a clear path towards Canada’s current immigration legal regime.

One interesting theme running through the development of Canadian immigration law through most of its history is its incrementalism. There have been few watershed moments in this history, but very regular small changes in law and policy. For this reason among others, successive governments have tended to favour regulatory change rather than legislative. However, there have been a few important historical turning points where governments have undergone significant changes in approach, and these turning points coincide to a certain extent with the bookends of the eras I have identified below. The two of these moments that will preoccupy most of this paper occurred in the late 1960s and early 1970s, and then in the past

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18 Canada, Department of Manpower and Immigration, Green Paper on Immigration: Reports of the Canadian Immigration and Population Study (Ottawa: Manpower and Immigration, 1974) at 1 [Green Paper].
19 Ibid. at 3.
decade. The former was accompanied by a broad national debate on immigration; as I will seek to demonstrate in a later chapter, the latter has not been.

1.1 Historical Periods of Canadian Immigration

While this is of course a simplification, it is helpful to divide Canadian immigration legal history into the following periods:20

i. Pre-Confederation: this was an era of imperial occupation and competition characterized by government-organized group migration from France and Britain, later supplemented by Loyalist immigration from the newly-independent USA. I have included it to set the context, but as it is the least relevant to our discussion I will spend the least time on this period.

ii. Confederation to World War I: this period was dominated by active recruitment and promotion of immigration including government-sponsored group migration of a wide mix of European immigrants, with a heavy focus on farmers and agriculture, with the primary goal of populating the West. This was the high point for Canadian immigration, numerically.

iii. World War I to 1967: the most notable feature of this period was the prevalence of explicitly and implicitly racist limitations on immigration, a focus on exclusion and deportation, and the lowest levels of immigration in post-Confederation history.

iv. 1967 to 2002: this was the reopening of Canada to the world with the removal of overt racial or national bias, accompanied by the bureaucratization and democratization of the immigration system. This is also the era when Canada pioneered the human capital model of skilled immigration, which will be a significant focus of this paper. Finally, it

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20 While I have chosen to divide the periods differently, I have drawn heavily on the historical account of Canadian immigration law from Kelley and Trebilcock, supra note 9.
is the period in which Canada introduced its first coherent temporary foreign worker programs.

v.  *The New Millennium*: The 21st century has been marked by a move away from the human capital model and the securitization of immigration law. This period, and the first of these two trends in particular, will be the main preoccupation of the following chapters.

The various periods identified above represent changes in law and policy, but these changes are also matched with significant fluctuations in immigration levels. While it is beyond the scope of this paper to examine the details of why immigration flows varied to such an extreme degree historically, it is clear that both legal and non-legal factors (economic, political and social) contributed to the huge changes in levels over time. The following graph shows annual permanent resident landings from 1860 to 2011:

![Canada - Permanent residents, 1860 to 2011](image)

*Figure 1: Canada - Permanent Residents, 1860 to 2011.*

As we can see from this graph, immigration levels have risen and fallen dramatically over the years before stabilizing somewhat in the late 1980s. Historically there have been several major

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spikes in immigration numbers, the most spectacular of which began during the tenure of Clifford Sifton as Minster of the Interior in the years leading up to the First World War, with almost 400,000 immigrants arriving in 1913. This was a time when the Federal Government was eager to counter US expansion plans by way of rapid agricultural settlement of the Prairies, primarily from Eastern Europe. Immigration then dropped almost to nothing during the Great Depression, followed by a spike of family reunification and some one-off refugee flows in the immediate post-Second World War years. Since then, though, immigration levels have remained comparatively steady at just under one percent of the population, particularly since the late 1980s, despite numerous changes in government and even in the face of significant evolution in immigration law and policy. Each of these historical peaks and valleys can be situated within the major eras of Canadian immigration law and policy.

1.1.1 Pre-Confederation: Imperial Occupation and Competition

Immigration to what is now Canada between the time of the first European settlements and Confederation was largely a story of imperial occupation and competition. Setting aside some of the earlier settlements that failed to take hold such as the Vikings in Newfoundland, European settlement started in earnest in 1605 with the foundation of Port-Royal (in present-day Nova Scotia) by a French imperial expedition.

Over the next 262 years, immigration to Canada was dominated first by government- and church-organized group migration from France, and then from Britain, later supplemented by Loyalist refugees from the USA. During this time, the population of what was to become

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23 Kelley & Trebilcock, supra note 9 at 62.
24 Kelley & Trebilcock, supra note 9 at 328 & 336.
26 Kelley & Trebilcock, supra note 9 at 21.
Canada is estimated to have risen from an estimated half a million\textsuperscript{27} to about 3.5 million,\textsuperscript{28} through a combination of immigration and domestic population growth.

The dominant theme of this period of immigration could be said to have been the efforts by European empires to secure control over newly discovered lands, asserting that control both over the prior residents and as against competing empires.\textsuperscript{29} I would suggest that the main lasting constitutional impacts of this period were the dominance of English law, the linguistic duality of Canada and the complex legal relationship between First Nations and newer immigrants and their descendants. And while the story of Canadian immigration will necessarily be incomplete without a serious examination of the troubled history of interaction between European empires, the post-Confederation Canadian state and Canada’s aboriginal peoples, such a discussion is regrettably beyond the scope of this paper.

1.1.2 Confederation to WWI: Agrarian Settlement of the West

Confederation in 1867 brought control over immigration law from London to Ottawa and led to new immigration priorities, almost solely focusing on promoting immigration.\textsuperscript{30} The first Canadian Immigration Act was passed in 1869, just two years after Confederation.\textsuperscript{31} Now that British or Canadian control over most of northeastern North America was secured, the next immigration objective was populating the West with loyal citizens who would expand Canadian control and avoid American encroachment.\textsuperscript{32} Policies during this phase were aimed at populating a supposedly (but obviously far from) empty country with European settlers.

While immigration did increase over the next few decades, it was the tenure of Clifford Sifton as Minister of the Interior in the government of Sir Wilfred Laurier that brought the most dramatic

\textsuperscript{29} Kelley & Trebilcock, supra note 9 at 21.
\textsuperscript{30} Kelley & Trebilcock, \textit{supra} note 9 at 62.
\textsuperscript{31} \textit{Ibid.} at 61.
\textsuperscript{32} \textit{Ibid.} at 61-2.
change. Sifton advocated massive immigration in order to “settle” the Prairies, favouring “a stalwart peasant in a sheep-skin coat, born on the soil, whose forefathers have been farmers for ten generations, with a stout wife and a half-dozen children” rather than highly-skilled urban workers. Between 1891 and 1914, over three million immigrants arrived in Canada, almost all from Europe, and primarily destined to the new Prairie Provinces. Despite the fact that the population of Canada in 1913 was only 7.6 million, that year represented the largest immigration flow in Canadian history with a staggering 400,000 new immigrants landing that year.

The government at the time favoured immigration by white, Christian farmers who would help Canada occupy the Prairies and develop domestic agricultural production, as well as providing a new domestic market for manufactured goods from Ontario and Quebec, while cementing the European racial character of Canada - East and South Asians, Africans, Jews and many others were either explicitly or implicitly not part of this plan.

1.1.3 WWI to 1967: Racist Exclusion

The period between World War I and the 1960s was in many ways the low point in Canada’s immigration history, from a legal and moral point of view and also in terms of numbers.

While the transformation was gradual, by the time the Great Depression started in 1930, the focus of Canadian immigration law had shifted from recruitment and promotion to exclusion and control. Some trends that had started before the First World War, such as imposing special taxes

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33 Ibid. at 117.
35 Kelley & Trebilcock supra note 9 at 111.
36 Statistics Canada, supra note 28.
37 Facts and Figures 2011, supra note 1.
38 Kelley & Trebilcock, supra note 9 at 62.
39 Ibid. at 142-3, 200.
on, and eventually completely excluding, certain groups of prospective immigrants (particularly Chinese), were greatly expanded.  

As a result of these measures, immigration slowed to its lowest level in the country’s history by the 1940s. Just before the First World War, the Continuous Journey Regulation was introduced to prohibit immigration from anyone who did not travel in a single unbroken journey from their home country to Canada (effectively and intentionally barring almost all South Asian immigration, as ships from India generally had to stop in Hong Kong and elsewhere). The tragic 1914 Komagata Maru incident, where hundreds of Indian immigrants were refused entry to Canada in highly troubling circumstances, was emblematic of this period. The notorious Chinese Immigration Act, 1923 prohibited almost all immigration by Chinese nationals. Immigration from Japan was limited by bilateral agreement in 1928. Furthermore, deportation began to be used on a large scale to remove undesirable immigrants of various origins.

During this period, immigration was restricted across the board. Uniquely in Canadian immigration history, economic immigration in particular was limited, with the majority of immigrants by the 1930s coming as family members of Canadians rather than independent economic migrants.

Economic and political factors exacerbated the situation. The Great Depression aggravated public opinion against immigration as well as growing xenophobia in many regions. Compounding the exclusionary attitudes prevailing in Canada, a struggling economy and agricultural failures combined to reduce immigration even further. The country’s population growth stagnated, the economy languished, and many non-European immigrants and their descendants were even encouraged (or forced) to leave the country permanently, resulting in a

40 Ibid. at 203.
41 Ibid. at 147-8.
42 See Komagata Maru: Continuing the Journey, online: Simon Fraser University Library and Citizenship and Immigration Canada <http://www.komagatamarujourney.ca>.
43 Kelley & Trebilcock, supra note 9 at 223.
44 Ibid. at 217.
45 Ibid. at 222.
46 Ibid. at 217.
less ethnically diverse Canada.\textsuperscript{47} By the beginning of the Second World War, immigration had almost ground to a halt, and the war itself then made it impossible for most people to reach Canada. Immigration reached its absolute lowest point in 1942, with fewer than 8000 new immigrants landing.\textsuperscript{48} This was a stunning reversal from the 400,000 immigrants admitted just 30 years earlier.

The Second World War itself saw xenophobic and anti-immigrant sentiment at its highest, culminating in first the internment and subsequently the semi-forced expulsion of much of the Japanese-Canadian population,\textsuperscript{49} using the pretext of war with Japan and purported disloyalty on the part of these residents, many of whom were Canadian-born citizens. The fact that some discriminatory measures continued after the war seems to unmask the true motivations behind the internments and deportations.


The years 1966-1967 saw the beginnings of a dramatic transformation of Canadian immigration law and policy. I will spend considerably more time exploring this period of development and implementation of the human capital model in the 35 years between 1967 and 2002, and how it set the stage for the changes of the past decade.

Canada’s immigration laws started to change slowly in the post-World War II period. Although racially-biased principles were openly affirmed as late is 1947,\textsuperscript{50} some of the overtly racist exclusions began to be incrementally removed, including the repeal of the Chinese Immigration Act that same year. Second, a focus on the ability of immigrants to settle in Canada, rather than their country of origin or race, became an increasingly important consideration in immigrant

\textsuperscript{47} Ibid. at 217, 334
\textsuperscript{48} Facts and Figures 2011, supra note 1.
\textsuperscript{50} Kelley & Trebilcock, supra note 9 at 312.
selection. This trend culminated in 1966 with the White Paper on Immigration under the Pearson administration.\textsuperscript{51}

The 1966 White Paper on Immigration marked a watershed moment in the development of Canadian immigration law and policy. Really for the first time, Canada engaged in a broad national conversation on the objectives of Canadian immigration, and on how to achieve them.\textsuperscript{52} The White Paper was a major catalyst for that conversation. Also for the first time, the White Paper (and the joint Senate-House of Commons Committee it spawned) articulated a clear vision of skilled immigration to Canada for the express purpose of contributing to the long-term health of the Canadian economy by way of a human capital model.\textsuperscript{53}

It is worth reproducing a particularly telling passage from the White Paper in its entirety:

\begin{quote}
A selective immigration policy today must be planned as a steady policy of recruitment based on long-term considerations of economic growth.

This factor is rather easy to overlook when the economy is particularly buoyant and there are, therefore, serious labour shortages even in many unskilled and semi-skilled occupations, particularly those which pay low wages or are otherwise unattractive. There is, naturally, a strong desire to bring in immigrants for such jobs. In the short run, production would be increased; everyone would benefit. But it is highly probably that, with technological developments and economic changes, the work for which such immigrants are recruited will in time slacken off. The damage is not undone by closing the tap when that time comes. The under-skilled immigrants are here. At that point, they are not an economic asset. They are, on the contrary, an addition to the very difficult problems of human adjustment posed by our flexible economy and the need for upgrading skills in order efficiently to meet the requirements of new technology.\textsuperscript{54}
\end{quote}

There are two main points being made in this very strong statement. First is a clearly-articulated argument in favour of bringing in highly skilled rather than low skilled workers. But perhaps more importantly for our purposes, the author makes a compelling case for selecting immigrants according to their ability to adapt to a changing economy, and not for their ability to fill current labour market shortages (at whatever skill level). Although it is not explicitly stated in the White

\textsuperscript{51} White Paper, \textit{supra} note 16.

\textsuperscript{52} Kelley & Trebilcock, \textit{supra} note 9 at 348.

\textsuperscript{53} Kelley & Trebilcock, \textit{supra} note 9 at 351.

\textsuperscript{54} White Paper, \textit{supra} note 16 at 12.
Paper, one can reasonably infer that the author would conclude that workers recruited for specific positions rather than for adaptability and transferrable skills would be vulnerable to changes in the economy regardless of whether they are brought for specific semi-skilled or specific high-skilled jobs. This is one of the earliest and clearest articulations of the human capital model.

The White Paper was the catalyst for a rapid series of important changes, and by the following year a new points system was implemented by way of regulatory amendments, giving increased weight to skills and adaptability and, for the first time, gave no weight to country of origin. After a hundred years of independent Canadian immigration policy, the last overt racial and national biases were finally removed, and the country moved firmly into a theoretically objective human capital model of immigrant selection.

The points system ushered in by the White Paper and enacted by regulatory amendment was a Canadian innovation; the 1967 regulations created the first system of this kind in the world. When it was first introduced, the points system assessed prospective immigrants based on the following factors:

<table>
<thead>
<tr>
<th>Factor</th>
<th>Points</th>
</tr>
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<tr>
<td>Education</td>
<td>20</td>
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<tr>
<td>Vocational Preparation</td>
<td>10</td>
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<tr>
<td>Demand in Canada for Occupation</td>
<td>15</td>
</tr>
<tr>
<td>Age</td>
<td>10</td>
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<tr>
<td>Pre-Arranged Employment Offer</td>
<td>10</td>
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<tr>
<td>Knowledge of English or French</td>
<td>10</td>
</tr>
<tr>
<td>Personal Suitability</td>
<td>15</td>
</tr>
<tr>
<td>Relative in Canada to Assist</td>
<td>5</td>
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<tr>
<td>Destination in Canada</td>
<td>5</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>100</strong></td>
</tr>
</tbody>
</table>

55 Kelly & Trebilcock, *supra* note 9 at 348.
57 Shachar, *supra* note 2 at 123.
This novel approach had the twin effects of completely removing any explicit preference for particular source countries or ethnicities at the same time as selecting immigrants from around the world who it was felt would both integrate into the current economy and adapt to future economic changes.

The focus of the new system was quite deliberately on long-term adaptability, although the points grid contained factors informing both long-term adaptability and short-term labour market needs.\(^59\) For example, the most of points were available for education and training. The report held that “[t]he better preparation a person has, the more likely he is to be able to go on improving his qualifications, productivity and personal achievement.”\(^60\) In other words, past education was seen as a good indicator of the likelihood of ongoing education needed to adapt to future changes in the labour market. The points assessment also took into account subjective adaptability (called “personal qualities,” allotting the second highest number of points to that factor.\(^61\) The “occupational skill” factor was also seen as one informing long term adaptability, as well as short-term success: “…the more skilled an immigrant is, the better are his chances for initial establishment and future success.”\(^62\) Age was also given considerable weight, both because younger workers tend to find work more easily\(^63\) but also presumably on the assumption that the long term prospects for younger immigrants would be better than those of immigrants nearing the end of their career. Other factors targeted a combination of short- and long-term adaptability considerations, but the balance of the assessment favoured the latter.

It is worth noting that the original points grid did contain the seeds of a future employment model, awarding points for having arranged employment in Canada and current occupational demand. However, the overall focus of the initial grid was on long-term adaptability.

The results of the new system were both obvious and significant. While overall immigration levels continued to fluctuate, the sources of immigrants were completely and permanently transformed. In 1967, approximately 146,000 out of a total of 222,000 (66%) immigrants came

\(^{59}\) Kelley & Trebilcock, supra note 9 at 351-2.

\(^{60}\) Green Paper, supra note 18 at 43.

\(^{61}\) Ibid. at 44.

\(^{62}\) Ibid. at 46.

\(^{63}\) Ibid. at 46.
from Europe, the USA, Australia and New Zealand. By 1977, just 55,000 out of 115,000 (48%) were from those countries. If one looks at the proportion of immigrants from the UK alone, the change is even more striking, from 32% to less than 16%. Concurrently, immigration from Asia rose during that period to a quarter of all immigrants.

The new system was largely seen as a success. For example, the 1975 Green Paper enticingly named *A Report of the Canadian Immigration and Population Study* found that “[g]enerally the use of the nine criteria [from the points grid] appears to have fulfilled the system’s main purposes – to judge with reasonable accuracy an individual’s potential…”

Another very important development of this era was a significant democratization of the process of developing Canadian immigration law and policy, and it is worth spending some time on this in order to present it in contrast to more recent developments that will be discussed later in this paper. As we will see, the process of undertaking the changes of the 1960s and early 1970s was notable for its openness and for the participation of numerous actors both inside and outside the political arena.

As noted above, the 1966 White Paper led to joint Senate-Commons committee hearings and broad consultations with interested groups from across the spectrum of Canadian society. Indeed, the very purpose of the White Paper was to spark this discussion; its introduction states unequivocally: “This White Paper is intended to assist public discussion, in and out of Parliament.”

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67 Kelley & Trebilcock, *supra* note 9 at 348.
69 *Ibid.* at 42.
70 Kelley & Trebilcock, *supra* note 9 at 349.
Advisory councils were also created to advise the government on immigration and manpower matters.\textsuperscript{72} Following these hearings and consultations, the 1967 regulatory changes received widespread support.\textsuperscript{73} Furthermore, the debates about immigration law and policy engaged Canadians at all levels in questions about both the overall philosophy to be applied to Canadian immigration law, and also as to the detailed mechanisms to be employed:

The publication of the White Paper in 1966 by the Department of Manpower and Immigration, followed by the Joint Senate-House of Commons Committee hearings, attracted broad participation and attention by politicians, special interest groups, church groups, ethnic groups, individual Canadians, academics, and the media.\textsuperscript{74}

This led to an ongoing public debate and involvement of non-governmental actors in developing immigration law and policy:

In terms of the politics of immigration policy, a broad range of private and public interest groups participated extensively in the political and consultative processes surrounding policy formulation. Church, ethnic, and community organizations began to play a particularly vocal and prominent part in these processes.\textsuperscript{75}

By the early 1970s, the federal government began working on new legislation to formalize the new system. Further consultations were held and the Green Paper mentioned above was commissioned to explore different approaches.\textsuperscript{76} The Green Paper itself came up with various recommendations that met with a lukewarm response from the joint Senate-Commons committee tasked with reviewing it, the committee itself ended up having an important impact on the drafting of the new legislation and accompanying regulations.\textsuperscript{77}

While the Green Paper was criticized for having been drafted in the absence of meaningful consultation, it sparked the public debate that was sought by its critics.\textsuperscript{78} The subsequent committee hearings made up for the initial lack of consultation by receiving input from a

\textsuperscript{72} Kelley & Trebilcock, supra note 9 at 349.
\textsuperscript{73} Ibid. at 340-360.
\textsuperscript{74} Ibid. at 349.
\textsuperscript{75} Ibid. at 350.
\textsuperscript{76} Ibid. at 349.
\textsuperscript{77} Ibid. at 349.
\textsuperscript{78} Kelley & Trebilcock, supra note 9 at 372.
staggering number of stakeholders, holding “fifty days of public hearings over thirty-five weeks in twenty-one cities…[and receiving] more than 1,800 briefs from both individuals and organizations.”

Not only were the consultations far-reaching in terms of the number and scope of groups, organizations and individuals who were heard from, but also in the scope of the topics upon which opinions were sought, covering almost the entire immigration and refugee system. The hearings even had to be extended by several months to accommodate the number of organizations wishing to make submissions.

It is interesting to note that the Green Paper, heavily criticized for having been produced without genuine consultation, was almost universally rejected. On the other hand, the broad-based consultation process initiated by the joint Parliamentary committee managed to achieve the extensive buy-in seen in the easy passage of the 1976 Immigration Act, which was passed with almost unanimous parliamentary support and which cemented the new selection model in legislation. As we will see in the next section, this is in marked contrast to the way in which immigration law has been drafted and implemented in the past decade and a half.

The final feature of this period that is important for our purposes was the creation of Canada’s first organized programs for recruiting and admitting temporary foreign workers. For most of Canada’s history, immigration policy has focused on recruiting permanent immigrants. This period saw the creation of several occupation-specific programs such as for agriculture and domestic work, and eventually a major expansion into most sectors of the economy with the advent of the Non-Immigrant Employment Authorization Program in 1973. Interestingly, the expansion of temporary foreign worker programs was not advocated by the 1996 White Paper,

79 Ibid. at 374.
80 Ibid. at 373-9.
81 Ibid. at 374.
83 Kelley & Trebilcock, supra note 9 at 349.
84 Kelley & Trebilcock, supra note 9 at 361.
85 Sarah Marsden “Assessing the Regulation of Temporary Foreign Workers in Canada”, (2011-2012) 49 Osgoode Hall LJ 39 at 44.
and the creation of these programs does not appear to form part of the coherent immigration model initiated at that time.

In some ways the impact of these temporary work programs was felt immediately, such as creating a large pool of non-immigrants in Canada with limited rights. However, their effect on Canada’s approach to permanent skilled immigrant selection was delayed for several decades until the beginning of the 21st century.

1.1.5 The New Millennium: IRPA and the Affirmation of the Human Capital Model

Coming into force on 28 June 2002, the *Immigration and Refugee Protection Act*\(^8^7\) represented the modernization and the public affirmation of the human capital model. In debates in the House of Commons and in committee leading up to the passage of the Act, it was repeatedly declared that the intention of Canadian immigration law and policy was to seek out not only the “best and brightest” but also the most adaptable immigrants – those with the skills, experience, language ability and other attributes that would allow them to integrate into the Canadian economy and also adapt and adjust as our economy changed over time. This philosophy is a clear articulation of the human capital model.

For example, in introducing Bill C-11 (which would later become *IRPA*) for second reading, then-Minister of Citizenship and Immigration Elinor Caplan declared: “The new century will belong to those who are best able to develop and expand their collective human capital. The knowledge based economy has become a reality.”\(^8^8\) And later the same day, she expanded on this focus on human capital and adaptability:

> In regulations authorized by Bill C-11, we would modernize our selection system for skilled workers. Independent immigrants would be selected for their adaptability, level of education and training, language skills, experience and general level of employability.

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\(^{8^6}\) *Ibid.* at 44-5.

\(^{8^7}\) *Immigration and Refugee Protection Act*, SC 2001, c. 27 [IRPA].

\(^{8^8}\) *House of Commons Debates*, 37th Parl, 1st Sess, No 021 (26 February 2001) at 1520 (Hon. Elinor Caplan).
In today's rapidly evolving labour markets we need people who are best able to adapt to new occupations as the needs of the labour market shift over time. These are people who would thrive and contribute to our prosperity in the economy of this new century.\textsuperscript{89}

It would be difficult to find a more definitive affirmation of the human capital model of skilled immigrant selection than this. Clearly the Minister’s belief, and those of her advisers, was that it made more sense to select immigrants who would have the general skills and abilities to integrate and adapt over the long term, rather than selecting permanent residents based on current or temporary labour market needs.

Again upon introducing the bill for third reading, then-Minister Caplan repeated, with respect to proposed regulations under the new act: “The regulations would include a strengthened program for overseas refugee resettlement, an expanded family class and new selection criteria to attract more skilled and adaptable independent immigrants.”\textsuperscript{90}

In each statement, the focus is on adaptability and on seeking out the basket of skills that will allow immigrants to integrate and adjust to a changing knowledge-based economy. There is no mention of meeting immediate labour market needs in any of these statements, and indeed a review of the debates in the Commons and in committee reveals very little preoccupation with filling current labour market shortages, whether through permanent or temporary immigration programs.

The 2004 Annual Report to Parliament, one of the first filed after the implementation of \textit{IRPA}, continues to affirm the primacy of the human capital model:

\begin{quote}
Since June 28, 2002, people who apply to come to Canada must meet new requirements to be admitted in the skilled workers category. They are assessed according to six selection factors: education, knowledge of the official languages, work experience, age, arranged employment in Canada and adaptability. \textit{Canada focuses on selecting workers with flexible and transferable skills, rather than on specific occupations or professions} [emphasis added]. The legislation takes into consideration the needs of the Canadian economy and facilitates the selection of technical workers and university graduates. In
\end{quote}

\textsuperscript{89} \textit{Ibid.} at 1530 (Hon. Elinor Caplan).

\textsuperscript{90} House of Commons Debates, 37\textsuperscript{th} Parl, 1\textsuperscript{st} Sess, No 078 (13 June 2001) at 1520 (Hon. Elinor Caplan).
addition, it attaches great importance to a knowledge of English or French. These characteristics give Canadian businesses access to the pool of skilled workers they need to continue to grow and prosper in a 21st century economy.91

Once again, the focus is on recruiting permanent residents who will contribute to the economy but will also have the skills to adapt to changing labour market conditions over time. Meeting current labour shortages is expressly not a primary objective of the immigration program.

Outside observers also perceived that Canada was affirming or even moving further towards a human capital model of skilled immigrant selection. In a comparative study on immigration laws in various immigrant-receiving countries originally published in 2009 but researched several years earlier, Usha George notes the following in discussing IRPA:

Perhaps one of the most unique features of the Act is its movement away from using an occupation-based model for the purpose of selecting skilled workers in the economic class, to employing a model based on transferable skills. The proposed Human Capital Model replaces the General Occupation List and intended occupation concepts. This model gives more weight to education and knowledge of an official language.92

Not only did the government of Canada express an intention to expand its reliance on the human capital model going forward, but this message appears to have been received and understood both at home and abroad.

Interestingly enough, though, IRPA itself says very little about how immigrants are to be selected. I will now reproduce the main excerpt from IRPA that guides economic immigrant selection, in its entirety:

12(2) A foreign national may be selected as a member of the economic class on the basis of their ability to become economically established in Canada.93

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93 IRPA, supra note 87, s.12(2).
Indeed, this really is basically all IRPA has to say about skilled immigrant selection. It seems astonishing that in the entire text of the main piece of legislation establishing and administering Canada’s immigration system, one where economic immigrants make up the large majority of immigrants, economic immigrant selection can be reduced to a single sentence in a single subsection of the Act.

The only other mention of selection criteria comes in s.14 which authorizes regulations, but says almost nothing about the principles upon which those regulations should be drafted:

14. (2) The regulations may prescribe, and govern any matter relating to, classes of permanent residents or foreign nationals, including the classes referred to in section 12, and may include provisions respecting:

(a) selection criteria, the weight, if any, to be given to all or some of those criteria, the procedures to be followed in evaluating all or some of those criteria and the circumstances in which an officer may substitute for those criteria their evaluation of the likelihood of a foreign national’s ability to become economically established in Canada.  

While there is a mention that any selection criteria will be set by regulation, there is no guidance as to the principles upon which the regulations should be made other than the “ability to become economically established in Canada,” which is simply a repetition of the wording from s.12(2). There is certainly no mention of the human capital model or any other philosophy of skilled immigrant selection, and any guiding philosophy is expressly left entirely to the regulations and policy to determine.

In promoting and defending Bill C-11 in 2001 and 2002, Minister Caplan made it clear that IRPA would be “framework legislation,” which is to say that it would be an enabling statute that would create the structure inside which immigration law would be made. However, it was not intended to contain the details of our immigration system; this would be left to the regulations. It seems strange, then, that in the debates around IRPA there were so many repeated assertions that the new act would promote the human capital model of economic immigrant selection. Indeed,

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94 Ibid., s.14(2)(a).
95 See e.g. House of Commons Standing Committee on Citizenship and Immigration, 37th Parl, 1st Sess, (1 March 2001) at 0915 (Hon. Elinor Caplan).
without its accompanying regulations, IRPA does not in fact espouse any selection model. While it is arguable that the details of the system should be left to regulation, it does seem peculiar that even the broad guiding philosophy of Canada’s immigration strategy should not even be articulated in the act that gives it life.

Given the absence of guidance in IRPA as to immigrant selection models, we must now turn our attention to the Immigration and Refugee Protection Regulations, most of which came into force on the same day as the Act, 28 June 2002.

S.76 of the IRP Regulations sets out the points assessment by which officers are to determine whether a skilled worker has the ability to become “economically established in Canada.” One of the factors enumerated is “adaptability” which is further defined by s.83:

**Adaptability (10 points)**

83. (1) A maximum of 10 points for adaptability shall be awarded to a skilled worker on the basis of any combination of the following elements:

(a) for the educational credentials of the skilled worker's accompanying spouse or accompanying common-law partner, 3, 4 or 5 points determined in accordance with subsection (2);

(b) for any previous period of study in Canada by the skilled worker or the skilled worker's spouse or common-law partner, 5 points;

(c) for any previous period of work in Canada by the skilled worker or the skilled worker's spouse or common-law partner, 5 points;

(d) for being related to a person living in Canada who is described in subsection (5), 5 points; and

(e) for being awarded points for arranged employment in Canada under subsection 82(2), 5 points.96

While the final element to be considered in assessing adaptability is for having pre-arranged employment in Canada, the other four factors relate to an immigrant’s ability to adapt to the

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96 *Immigration and Refugee Protection Regulations*, SOR 2002-227, s.83(1) [IRPR].
Canadian labour market more generally: having a well-educated spouse, having previously worked or studied in Canada or having relatives in Canada who can assist them in integrating.

The importance of arranged employment does not appear to have been completely overlooked in the drafting of the Regulations; it simply seems to have been downplayed, a kind of afterthought to the main event of the points selection. In testimony to the Standing Committee outlining the proposed new points grid, the late Joan Atkinson, CIC’s lead spokesperson on the proposed regulations, explained that:

> Going through arranged employment is certainly a good way of doing it. I suspect, though, that we're still going to see situations under the new grid where people will come as temporary workers and then apply to become permanent residents after they've been here for a period of time as temporary workers. Of course, the adaptability factor we have in the pre-published grid has the possibility of extra points being awarded if you've worked or studied in Canada. So I would suspect that's the way most employers will do it in the future...Two percent of our skilled worker applicants currently have permanent, arranged employment, so it's not used very frequently. We still think it's a worthwhile factor to have because, as I think you've pointed out, Mr. Chairman, it's a very good indication of successful establishment if someone has a definite offer of employment that they will definitely be going to when they arrive in Canada. So we still think it's a worthwhile factor to have on the grid.97

In other words, while the government acknowledged that having arranged employment in Canada was one of several useful indicators of skilled immigrant success, this was seen as a tiny part of the selection system and by no means as replacing the traditional “independent” points assessment. At the same time, this statement may be seen as prescient of the coming move to a two-step immigration process.

It might be supposed that such a statement coming from a senior, activist public servant may have been more than musing and was perhaps prescient of the changing focus that would follow. We can only speculate as to whether senior CIC staff envisioned the two-step employment selection model becoming predominant at this stage. In any case, the regulations themselves that were introduced as a result of these discussions belie the existence of such a vision.

97 House of Commons Standing Committee on Citizenship and Immigration, 37th Parl, 1st Sess, (12 March 2002) at 1110 (Joan Atkinson).
Despite the lack of any articulation of overall skilled immigrant selection philosophy in the Act, and passing mentions of arranged employment aside, it appears clear that the accompanying regulations intended to affirm and perpetuate the dominance of the human capital model. It is also clear that the government intended at the time of passing IRPA to continue to favour the human capital model, even strengthening it by removing the occupations list that accompanied the regulations under the previous Act. However, legal and policy developments in the 11 years since the enactment of IRPA have led us in a completely different direction, to the point that the human capital model is all but dead. I will now turn my attention to examining those developments and the policy motivations behind them.
Chapter 2

The New Millennium and the Abandonment of the Human Capital Model

2.1 The Beginnings of the New Order: Late 1990s

While I have defined the current historical era of immigration law as beginning in 2002, there was obviously some overlap in trends and in fact the country’s immigration legal framework began to evolve in small but significant ways in the late 1990s. This started with the signing of immigration agreements between Canada on the one hand and Manitoba and British Columbia on the other,98 the first of what would eventually become broad modern agreements with all provinces and territories giving them significant control over immigrant selection and settlement. While previous agreements with Quebec and Nova Scotia in 1978 had given extensive powers to Quebec in particular, Quebec had not exercised those powers in a way that significantly changed the way immigrants were selected, but simply which level of government was selecting them (Nova Scotia’s agreement was always more limited and did not result in a separate selection regime at that time).99 What was new with the Manitoba and BC agreements is what those provinces chose to do with their newfound authority, which is to pioneer an entirely new selection model based on employer nominations.

Here I will examine some of the early changes that began to chip away at the 1970s model, including the creation of the first Provincial Nominee Programs (building on the already large-scale downloading of selection to Quebec), the gradual increase in foreign student numbers, and changing philosophies of immigrant selection – moving from the human capital model to a more labour-market driven model.

The most significant changes include:

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99 Kelley & Trebilcock, supra note 9 at 392.
i. Arrival and growth of the Provincial Nominee Programs 
ii. Rise and Fall of the Arranged Employment Opinion 
iii. Creation of the Canadian Experience Class 
iv. Reweighting of the Federal Skilled Worker Points System 
v. Creation of the PhD Stream 
vi. Restriction of the Federal Skilled Worker Category 
vii. Expansion of Temporary Foreign Workers and Students 

Each of these changes was implemented separately, and as we will see there is little indication that they have formed part of a single coherent strategy to reform Canadian immigration law.

### 2.2 The Drift Away from the Human Capital Model

Since the resounding affirmation of the human capital model in the process of passing and implementing *IRPA*, there has been a steady move away from that philosophy of immigrant selection, towards one that is designed to respond to immediate labour market needs. This has happened through a series of incremental changes, all carried out in the absence of almost any meaningful parliamentary debate and almost no significant legislative change. This has continued to the point where the system we have today is a reflection of a dramatically different philosophy. In little over a decade, the human capital model has largely been supplanted by an employment-based model.

This chapter will go through each of the main changes identified above and examine the impact of each one and how it came about. Many of these changes relate to targeting the high-skill temporary foreign worker population as a pool of potential applicants for permanent residence. And just as with temporary foreign workers, a number of programs have sprung up to provide avenues for permanent residence for foreign students.

As we will see, at first the key program for skilled immigrant selection, the Federal Skilled Worker Program, continued to implement the human capital model, even strengthening it by removing the specific occupations list that had been in place under the 1976 regulations.
However, other programs were beginning to become increasingly important in the overall skilled immigrant selection regime. As these alternatives grew in importance, the human capital model began gradually to give way until finally the Federal Skilled Worker Program itself underwent a complete transformation.

2.2.1 1998-Present: Arrival and Growth of the Provincial Nominee Programs

The first modern provincial move into Canadian immigration policy came with the signing of the Canada-Quebec Accord in 1991, which delegated broad authority for immigrant selection to that province’s government. Quebec’s foray into immigration law-making remained unique in Canada for the better part of a decade and as noted above, Quebec made few philosophical changes to immigrant selection, simply supplanting federal selection with provincial selection conducted in a similar way. However, by the late 1990s pressure was mounting from several provinces for the federal government to give other provinces more say in immigrant selection. After extensive negotiations, the next three federal-provincial agreements were signed in 1998. Manitoba launched the first provincial nominee program later that year, with the first nominees arriving in the province in 1999. Saskatchewan and British Columbia followed suit shortly afterwards. One by one, all of the remaining provinces and territories (except for Nunavut) signed their own agreements and implemented nominee programs, with the Northwest Territories being the last to join the party a decade later in 2009. The agreements were entered into under the authority of s.108 of the Immigration Act, 1976 and later s.8 of IRPA. Some

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100 Canada-Québec Accord Relating to Immigration and Temporary Admission of Aliens, 5 February 1991, online: <www.parl.gc.ca>.
101 Baglay, supra note 98 at 126.
102 Ibid. at 127.
105 Immigration Act, RS 1985, C-I2 s.108.
106 IRPA, supra note 87, s.8.
of the agreements are permanent, while others continue to be renegotiated annually or at other intervals.\textsuperscript{107}

In addition to delegating certain powers with respect to settlement and other immigration-related responsibilities, each agreement provides the province or territory in question the ability to “nominate” certain types of immigrants according to its own criteria. Nominated applicants are then eligible to apply for permanent residence on the basis of that nomination and do not need to qualify under any federal immigration category. However, federal authorities continue to assess admissibility for nominated applicants including medical, criminal and security screening.\textsuperscript{108}

While there is some variation between the different agreements, they have a number of common features and all give provinces and territories the ability to design their own immigrant selection criteria within certain parameters set out in the agreements. Provinces and territories have used the scope given to them under their agreements to design a surprising variety of selection programs. For example, some provinces have introduced family sponsorship categories that allow for sponsorship of a broader category of family members than those defined in \textit{IRPA},\textsuperscript{109} many have entrepreneur categories for those intending to start or purchase and operate businesses,\textsuperscript{110} some have low-skill worker categories for critical occupations such as truck drivers and oil and gas workers,\textsuperscript{111} and others have university graduate categories to retain those who have completed degrees at universities in the province.\textsuperscript{112} However, all have employment-based high-skill worker categories. It is this final type of category that has been the most widespread (all 12 provincial and territorial nominee programs have something of this nature).

\textsuperscript{108} \textit{IRPA}, \textit{supra} note 87, s.8(3).
\textsuperscript{109} See e.g. the Saskatchewan Immigrant Nominee Program, online: <http://www.saskimmigrationcanada.ca/family-referral>.
\textsuperscript{110} See e.g. the New Brunswick Provincial Nominee Program, online: <http://www.welcomenb.ca/content/dam/gnb/Departments/petl-epft/PDF/PopGrowth/GuideBusinessApplicants.pdf>.
\textsuperscript{111} See e.g. the Alberta Immigrant Nominee Program, online: <http://www.alberta.ca/immigration/immigrating/ainp-eds-semiskilled-criteria.aspx>.
\textsuperscript{112} See e.g. the British Columbia Provincial Nominee Program’s International Graduates category, online: <http://www.welcomebc.ca/Immigrate/immigrate-BC/Provincial-Nominee-Program-Home/Strategic-Occupations-Home/International-Graduates-Home.aspx>. 
and also the most used (the majority of nominees in all jurisdictions have come through one of these categories).\textsuperscript{113} It is also the most relevant for our discussion about human capital and skilled immigrant selection. I will therefore take some time to outline how these programs work.

The British Columbia Provincial Nominee Program provides us with an early and fairly “typical” example of a high-skill employment-based nominee category;\textsuperscript{114} many of the other provincial programs follow similar models. It is therefore useful to examine the BC program in some detail.

In the BC category in question, the Strategic Occupations category, an employer and a foreign employee (or prospective employee) make a joint application for nomination to the provincial authorities. There are two ways in which this can be done. In some cases, a foreign national will obtain a work permit to work for a BC employer through some other program, for example supported by a labour market opinion from Human Resources and Skills Development Canada pursuant to s.203 of the Regulations, as an intra-company transferee under s.205 of the Regulations, or as a NAFTA Professional under s.204 of the Regulations, and will begin working for the employer in BC. After working for a time, the employer may decide that it wishes to retain the employee permanently and will initiate the nomination process with the employee on the basis of the existing job. In this case, if the nomination is approved, the worker can then apply for permanent residence in order to remain in Canada and in the same job.

In other cases, a BC employer will identify a prospective employee who is outside of the country and the two will apply jointly for a nomination. In this scenario, if the nomination is approved, the worker can then apply for a work permit on the basis of the nomination pursuant to s.204 of


\textsuperscript{114} See the BC Provincial Nominee Program website for details, online: <http://www.welcomebc.ca/Immigrate/immigrate/Provincial-Nominee-Program-Home/Strategic-Ocupations-Home/Skilled-Workers-Who-Can-Apply.aspx>.
the Regulations,\textsuperscript{115} and can also apply for permanent residence on the basis of the same nomination pursuant to s.87 of the Regulations.

In either case, the applications for work permits and for permanent residence are still processed by the federal authorities for admissibility, but the selection decision has already been made by the province on the basis of employer support. It is worth noting that all of the federal-provincial agreements allow federal authorities to override provincial selection decisions in certain circumstances.\textsuperscript{116} However, the federal authorities have explicitly surrendered the primary selection decision to the provinces and territories in each case and are simply retaining a veto power over that selection, which in the writer’s professional experience is very rarely exercised.

While employers may nominate employees in Canada or prospective employees overseas, the vast majority are already in Canada and are selected from inside of Canada; between 2004 and 2008, no fewer than 78\% of BC nominees were already temporary residents, primarily high skilled temporary foreign workers.\textsuperscript{117} It is not clear that the PNPs were initially intended to be a mechanism for selecting in-Canada skilled workers, but the statistics demonstrate that this is very much what they have become.

Like many of the other Provincial Nominee Programs, the British Columbia PNP allows employers to seek nominations in a wide variety of occupations – a much broader range than those eligible to apply in the Federal Skilled Worker Program.\textsuperscript{118} There is also no individualized labour market test to determine a lack of qualified Canadians for a position, although the program does conduct general labour market assessments and requires general employer recruitment information to ensure that foreign workers are not displacing local workers.\textsuperscript{119} As I will discuss below, the Federal Skilled Worker category has increasingly limited the occupations

\textsuperscript{115} IRPR, \textit{supra} note 96, s.204 (which covers work permit issuance pursuant to both international agreements and federal-provincial agreements).
\textsuperscript{117} BC PNP Evaluation Report, \textit{supra} note 113.
\textsuperscript{119} \textit{Ibid}. 
eligible for selection, while many provinces have maintained open occupational parameters, subject to there being an approved job offer in place.

On the student side, provincial nominee programs have also expanded options for permanent residence. Several provincial governments have introduced programs specifically targeted at recent graduates from universities and colleges in their province. For example, the BC Provincial Nominee Program’s International Graduates category allows graduates from approved public BC post-secondary educational institutions who meet certain other criteria and who have obtained post-graduation work permits and have started working in their field, to apply for permanent residence even before accumulating any minimum amount of work experience. The pool of potential immigrants already in Canada has therefore been broadened to include not only temporary foreign workers (primarily high skill) but also foreign students.

Most foreign students are issued study permits on the basis of acceptance to particular schools and programs. This means that educational institutions (in this case universities and colleges) are given a role in the first step of immigrant selection, as the pool from which immigrants are selected for student categories has been pre-selected by those schools. Universities and colleges, along with employers, are assuming an increasingly important role in skilled immigrant selection.

2.2.2 2002-2013: Rise and Fall of the Arranged Employment Opinion

With the coming into force of IRPA in 28 June 2002, the federal government introduced a new way for employers to support applications for permanent residence in the Federal Skilled Worker program for prospective employees. The Arranged Employment Opinion process under s.82 of the Regulations allowed an employer to identify a foreign national and offer them employment conditional upon them becoming a permanent resident of Canada. The employer would apply to
Human Resources and Skills Development Canada for the Opinion and was required to demonstrate a genuine need for the worker, that the business could sustain the employee, and that the prospective employee was qualified for the position. The employer was not required to show that no Canadians were available for the position. In the event of a positive Arranged Employment Opinion, the foreign prospective employee could then apply for permanent residence as a Federal Skilled Worker with two benefits: first, they would receive up to 15 extra points for arranged employment; and second, they would receive priority processing of their application for permanent residence.

This process had the effect of allowing Canadian employers to heavily influence the selection of prospective immigrants. However, the Arranged Employment Opinion was simply an add-on to the general points assessment, not a replacement for it. The foreign nationals still had to apply for permanent residence like any other applicants and had to meet the pass mark, but with significant advantages in qualifying and in processing time. They could still be refused if they failed to be awarded sufficient points in other areas of the assessment, or if they were inadmissible for criminal, medical, security or other reasons. The human capital model was under threat but was not yet dead.

For much of the life of the program the Arranged Employment Opinion process was seen as highly susceptible to abuse. Very little verification was conducted of employers to ensure the job offers were genuine, or that the workers would actually work in the positions once they arrived. There were allegations of businesses fabricating large numbers of fake job offers from either genuine or fake businesses solely in order to obtain positive Opinions for prospective applicants who would pay to receive the offers.

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122 IRPR, supra note 96, s.82.
125 See e.g. Ryan Rosenberg, “Immigration Fraud”, online: Canadianimmigrant.ca <http://canadianimmigrant.ca/immigrate/immigration-fraud>.
As a result of the criticisms levelled at the program as well as the obvious duplications with various Provincial Nominee Programs, the Arranged Employment Opinion program was phased out by regulatory amendment in December 2012. Employers seeking to support applications for permanent residence for prospective employees in the Federal Skilled Worker program are now required to obtain Labour Market Opinions. These latter opinions involve a much more stringent assessment pursuant to s.203 of the Regulations, including demonstrating adequate efforts to hire Canadians for the position. While the Arranged Employment Opinion has disappeared, the ability to obtain additional points pursuant to s.82 of the Regulations remains; it simply requires additional hurdles to obtain those points under the new regulations.

Before being eliminated, the Arranged Employment Program was widely used; a 2010 report on the Federal Skilled Worker Program estimated that 13% of successful FSW applicants received points for arranged employment, and many of these would have had Arranged Employment Opinions (some others may have had work permits issued pursuant to international agreements or other provisions). Assuming a relatively stable percentage over its life, this would mean that Arranged Employment Opinions supported permanent residence applications for tens of thousands of immigrants in the decade of its existence – a very significant number of new permanent residents effectively selected by their employers.

2.2.3 2008-Present: Canadian Experience Class

One of the most widely-discussed innovations in skilled immigrant selection of the past decade has been the Canadian Experience Class. Introduced by regulatory amendment in 2008, this created a completely new route to permanent residence based on work (and in some cases study) experience in Canada.

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126 Regulations Amending the Immigration and Refugee Protection Regulations, SOR/2012-274, s.11.
127 IRPR, supra note 96, s.203.
129 Immigration and Refugee Protection Regulations, SOR/2002-227, s.87.1.
The Canadian Experience Class eschews the points system that has been at the centre of the Federal Skilled Worker class for decades and replaces it with a simple pass/fail assessment. When it was introduced, the new category required applicants to have at least two years of full-time high-skill work experience in Canada, or at least two years of full-time post-secondary studies at an approved Canadian post-secondary institution, followed by at least one year of full-time high-skill work in Canada. This was later simplified to require only one year of full-time high-skill work in Canada, regardless of Canadian studies. There is also a pass/fail language evaluation and the usual admissibility assessment for applicants.

What this means is that all applicants to the Canadian Experience Class must first have obtained work permits through some other category supported by Canadian employers, and have worked in Canada pursuant to those work permits. Again, those employers are effectively pre-selecting applicants to this category as it would not be possible to qualify without first having obtained an employer-supported work permit. This raises Canadian work experience to a level of importance beyond any other criterion: in this category, having an employer-support work permit is not only a route to additional points, but is part of the very definition of this class of skilled immigrants. While it is possible to apply in this category after leaving Canada following completion of at least one year of work, a significant majority of those applying for permanent residence under the Canadian Experience Class are in Canada working at the time of application and at the time of approval, meaning that new immigrants in this category are being selected from the current temporary worker pool. The requirement that the work experience be high-skill also means that immigrants are almost always being picked from the current high-skill foreign worker pool. Even the small minority who may have left Canada before applying were still selected at some earlier point by Canadian employers.

The initial uptake of the Canadian Experience Class was considerably less than the government had anticipated. In the first year, 2008, Citizenship and Immigration Canada set a target of 10-12,000 visas issued per year. In fact, not one visa was issued in the first year, although this was

130 Ibid.
131 IRPR, supra note 96, s.87.1.
132 Ibid.
only a partial year due to when the program was introduced.\textsuperscript{133} However, in the second year the category fared only marginally better: just over 2500 against a planned target of 5000-7500.\textsuperscript{134} Over the five years since its introduction, though, with extensive promotion and the gradual asphyxiation of the Federal Skilled Worker category, landings have increased steadily to the point where now almost 6000 principal applicants and more than 9000 total immigrants were landed as new permanent residents in 2012.\textsuperscript{135} This is starting to represent a more significant proportion of the total skilled immigrant flow.

As noted above, the Canadian Experience Class underwent a major change to its selection criteria in 2012. When it was introduced in 2008, it provided for two different streams. The worker stream required two years of full-time skilled work experience in Canada, while the student stream required one year of full-time skilled work experience following at least two years of qualifying study in Canada. The 2012 revisions combined the two into a single requirement for just one year of skilled work experience, regardless of whether or not applicants had also studied in Canada. This has had the effect of greatly expanding the pool of qualified potential applicants, and further emphasizes the government’s focus on selecting permanent immigrants from the temporary resident population. It has yet to be seen whether these changes will actually increase landings in this class, given that in the writer’s experience processing times are typically well over a year in most cases.

As noted above, when it was introduced in late 2008 the Canadian Experience Class had two separate streams. In addition to the worker stream described above, a student stream allowed applicants to qualify who had completed two years of full-time study at an approved Canadian institution, followed by one year of skilled work experience in Canada (as opposed to two years for those without Canadian education). This gave educational institutions a further role in skilled immigrant selection, due to their responsibility for accepting foreign students. Again, while it would be possible to accumulate the required education and work in Canada, leave Canada and


\textsuperscript{135} CIC Preliminary Tables 2012, \textit{supra} note 3.
then apply for permanent residence, it appears that the vast majority of applicants would have been in Canada and working at the time of application, even in the student stream.

2.2.4 2002-2004: Re-weighting of the Skilled Worker Points

I will discuss the recent dramatic changes to the Federal Skilled Worker Program in the following section. However, even before the program was frozen and redesigned, it underwent numerous changes to the points system starting with the implementation of IRPA in 2002. One of the most significant changes from the previous Immigration Act points assessment was to re-weight the importance of Canadian employment. Applicants with arranged employment in Canada could be awarded up to 15 extra points, a very significant number out of a total possible 100 points, and enough to push many applicants over the pass mark – originally 75 and later lowered to 67 points. Past work or study in Canada also gave applicants without a current Canadian job offer additional points. In 2004, a regulatory amendment expanded the class of applicants who would get additional points for having arranged employment in Canada.  

By 2006, the new points grid looked like this:

<table>
<thead>
<tr>
<th>Factor</th>
<th>Points</th>
</tr>
</thead>
<tbody>
<tr>
<td>Education</td>
<td>25</td>
</tr>
<tr>
<td>Language</td>
<td>20</td>
</tr>
<tr>
<td>Work Experience</td>
<td>21</td>
</tr>
<tr>
<td>Age</td>
<td>10</td>
</tr>
<tr>
<td>Arranged Employment</td>
<td>10</td>
</tr>
<tr>
<td>Adaptability</td>
<td>10</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>96</strong></td>
</tr>
</tbody>
</table>

The rebalancing of the Federal Skilled Worker points assessment greatly increased the importance of having arranged employment in Canada. In particular, the points for arranged employment were increased, and the additional adaptability points for having previous work or study experience in Canada were also increased (needs verification). While some applicants may

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137 See *Immigration and Refugee Protection Regulations SOR/2002-227*, s.76.
have worked or studied in Canada and then left before applying for permanent residence, many would be in Canada working at the time of application. In the years before the introduction of the Canadian Experience Class, the re-weighted points assessment of the Skilled Worker category became a quasi-“independent” immigrant category that heavily favoured those who had been pre-selected by employers and schools.

With the reweighting of the points assessment and the Arranged Employment Opinion operating in tandem, the number of new permanent residents transitioning from temporary worker status began to rise rapidly. In 2002, the year IRPA was enacted, just 9302 temporary foreign workers became permanent residents.\(^{138}\) In 2008, the year before the Canadian Experience Class began landing its first immigrants, 27,564 temporary foreign workers landed as permanent residents. In 2011, the most recent year for which complete data are available, 29,908 temporary foreign workers became permanent residents, and the majority of these were in the economic class. It is interesting to note that the overall numbers did not increase as dramatically after the introduction of the Canadian Experience Class, suggesting that the latter program was competing for at least some of the same potential immigrants.

In addition to increasing the value of Canadian work experience, the post-IRPA points assessments also gave additional weight to Canadian studies (although less than for Canadian work experience).

2.2.5 2011: Creation of the PhD Stream

The PhD stream is a recent creation, launched by Minister’s Instructions in November 2011 as part of the overall Federal Skilled Worker category.\(^{139}\) Applicants are eligible if they have completed at least two years towards a Ph.D. in Canada, or have completed a Canadian PhD in the past 12 months, but must still meet the same points assessment as other Skilled Worker applicants. This program obviously favours those who are studying in Canada and those who

\(^{138}\) Facts and Figures 2011, supra note 1.

have recently graduated (and in many cases are working in Canada pursuant to post-graduation work permits).

While the PhD stream targets students rather than workers, it is still focused on recruiting those who already have Canadian experience and in many cases have work lined up with Canadian universities or government research institutes. In any case, candidates in this stream have effectively been pre-selected by their universities as they must first have been admitted with study permits to complete their studies in Canada.

The PhD stream is limited to 1000 applicants per year,\(^{140}\) so this is a much less numerically significant program than the Canadian Experience Class. We also have yet to see detailed statistics showing how many have actually applied and been approved. Nevertheless, it does show the government’s continuing entry into selecting permanent immigrants directly from the temporary resident population, as well as its attempts to compete with similar provincial programs.

It could of course be argued that the PhD stream is simply another way of selecting immigrants for adaptability, given the connections between higher education and success in the labour market. However, this stream is selecting specifically for those with Canadian PhDs, not simply anyone with these degrees. While there may be an element of the human capital model in this program, I suggest that the PhD stream remains a contributor to the slide away from the focus on human capital.

2.2.6 2008-2013: Restricting the Federal Skilled Worker Category

As the government has expanded options for prospective immigrants with confirmed employment in Canada, it has at the same time constricted the traditional points-based Federal Skilled Worker category. Starting in 2008, the types of occupations that were eligible to apply for permanent residence began to be limited, first to 38 occupations,\(^{141}\) and now to just 24

\(^{140}\) *Ibid.*

occupations. In 2012, a complete freeze was placed on the program and no further applications were accepted while the whole category was completely redesigned. The new program was introduced on 4 May 2013 by way of Minister’s Instructions published in the Gazette.

The new Skilled Worker program represents almost the final demise of the points system as we know it. From the open program continued with the implementation of IRPA in 2002, we have now seen the program reduced to a tiny fraction of what it once was. First, the list of eligible occupations has been limited to just 24 occupations listed in the National Occupational Classification. Second, a global cap of 5000 applications has been placed on all applications combined. There are provisions for a further 1000 applications to be accepted in the PhD stream and 5000 in the new Skilled Trades category.

The only Skilled Worker applicants who are exempt from the per-occupation and overall caps are those who have arranged employment in Canada. In other words, the old Skilled Worker program, heir to the venerable Independent category from the 1976 Immigration Act, is all but dead. Those who are truly “independent” applicants are all but barred from applying.

Perhaps the final step towards the death of Canada’s independent skilled immigration program is the proposed “expression of interest” system. The EOI system will allow prospective immigrants to add their names to a list of those wishing to immigrate to Canada, by providing some basic information. Canada will then be able to pick from that list to meet current national or regional labour market needs. Only then would these prospective immigrants be invited to apply for permanent residence; in the absence of a backlog of applications, this would in theory allow for very fast processing. However, I would argue that this provides only the illusion of the elimination of a backlog, as in effect it would create a perpetual purgatory for prospective immigrants who have formally indicated their desire to come to Canada, have provided their

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details to CIC, and then who will wait an undetermined amount of time (in some cases forever, if they are never invited to apply) before they can actually apply to immigrate.

From being almost the only option for highly-skilled independent immigrants in the late 1990s, the Federal Skilled Worker Category has gradually faded into obscurity, and now accounts for only 36,777 principal applicant approvals in 2011 (and almost certainly fewer in 2013), for a total of fewer than 90,000 new permanent residents when dependent family members are included.  

2.2.7 Ongoing: Expansion of Temporary Foreign Workers and Students

The final piece of this immigration puzzle is found in the spectacular increase in the numbers of temporary foreign workers and students admitted to Canada over the past three decades. Quite apart from any legislative change, this demographic shift has far-reaching implications that are only just now beginning to be understood.

As a country of permanent immigration, Canada did not have a significant formal temporary foreign worker program until the 1960s, and even then it began very modestly with a small sector-specific program for agricultural workers. This was extended over time to include high-skill workers and live-in caregivers in the 1980s. By the mid-1980s, the number of temporary foreign workers for the first time exceeded the number of permanent immigrants, although this subsequently declined following the recession of the late 1980s. A marked increase began after 2002 when policies were changed to allow certain workers in low-skill occupations to obtain work permits.

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144 Facts and Figures 2011, supra note 1.
146 ibid. at 20
147 ibid. at 20-21
By 2008, temporary foreign workers again outnumbered permanent immigrants and this situation has continued to the present.\footnote{Facts and Figures 2011, supra note 1.} In the most recent year for which data are available, 2011, more than 190,000 temporary foreign workers entered Canada. The number of temporary foreign workers present in Canada at the end of the year was estimated at just over 300,000. Regardless of which of these numbers are used, a plurality of temporary foreign workers for whom skill levels were indicated were issued work permits for skill levels 0, A and B (managerial, professional, skilled and technical). 29.4% of all foreign workers were issued higher-skilled work permits, while 27.3% were issued lower-skilled work permits. The remaining foreign workers were issued work permits with no occupation listed.\footnote{In 2011, almost 40% of work permits did not state an occupation (Facts and Figures 2011, supra note 1). Based on the writer’s professional experience, work permits might not list an occupation (informally called “open” work permits) in many circumstances, including those issued under the International Experience Category (formerly Working Holiday Program and Student Work Abroad Program), those issued to pending refugee claimants, those issued to permanent residence applicants in Canada who have obtained first stage approval of their applications (primarily spouses of Canadians and humanitarian and compassionate applicants), Temporary Resident Permit holders and others. Open work permits normally do not specify the occupation, location or employer. Some holders of open work permits may not even be working but may have obtained them in case they decide to work at some point, so it is almost impossible to assess how many of this class of work permit holders would be working in what occupation at any point in time. I have therefore excluded them for the purposes of this study.}

While the percentage of high-skilled temporary foreign workers has declined over the past decade, those workers still make up the majority of occupation-specific temporary workers in Canada. While there may be a popular misconception that most temporary foreign workers in Canada are lower-skilled workers, the truth has in fact always been the opposite. This has important implications for the debates around temporary foreign workers and permanent immigrant selection. The most important consideration here is that the majority of these workers have access to permanent residence through the Canadian Experience Class, the Federal Skilled Worker program and the various provincial and territorial nominee programs.

Several factors led to the huge increase in temporary foreign workers between the 1980s and the 2010s. First were a number of legal and policy changes that expanded the types of employers who could support work permit issuance, as noted above. Several periods of significant economic growth also contributed to the perceived need for more workers in numerous
industries. There has also been a concurrent shift in employer culture to see the employment of temporary foreign workers as a legitimate way of addressing ongoing labour shortages, rather than simply a short-term solution for bridging temporary skill gaps.

Over the past decade the flow of temporary foreign students has also risen significantly. In 2002, 76,290 foreign students were issued study permits; in 2011, 98,383 were admitted. Although this is also a factor in the ongoing shift in immigration policy, the numbers are less notable than those of foreign workers and given their less direct routes to permanent residence, I will not go into great depth about this population. In any case, taken together temporary foreign workers and students number almost 300,000 admitted to Canada in a single year, compared with fewer than 250,000 permanent immigrants in all categories in the same year. As noted above, the admissions only tell part of the story, as workers in particular are now staying longer: the stock of temporary foreign workers present in Canada has increased from just over 100,000 in December 2002 to more than 300,000 in December 2011.

The huge increases in the numbers of temporary foreign workers and foreign students have created a pool of people from which permanent immigrants are increasingly being drawn. The government has seen these populations as legitimate and desirable sources of immigrants, as noted for example in CIC’s 2009 Annual Report to Parliament. However, it does not appear that the expansion of the temporary foreign worker program was initially intended to create a two-step route to permanent residence or to provide a pool of potential immigrants.

These numbers represent perhaps the largest shift in Canadian immigration realities in the past few decades: admissions of temporary workers and students exceeding admissions of permanent immigrants. Although this did not come about solely as a direct result of legislative change, it

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151 Yessy Byl, “Temporary Foreign Workers in Canada: A Disposable Workforce?” (Spring 2010) Canadian Issues 96 at 96 [Byl].
152 Facts and Figures 2011, supra note 1.
153 Ibid.
154 Ibid.
155 CIC Annual Report 2009, supra note 133 at 18.
156 Sweetman and Warman, supra note 144, at 22.
has almost certainly spurred significant legal evolution. The following chapters will examine the relationship between the increase in foreign workers, the legal changes of the past decade and a half, and the overall shift in Canada’s approach to skilled immigrant selection.
Chapter 3

Problematizing the Move Away from the Human Capital Model

The dramatic changes in the selection of skilled immigrants over the past decade or more have engendered numerous policy challenges that have yet to be addressed adequately. This chapter will identify some of these.

3.1 The Infinite Loop: Three Parallel Trends that Perpetuate Each Other

The changes outlined in the previous chapter have been accompanied by a series of parallel evolutions:

1. Overseas to in-Canada selection
2. One-step to two-step immigration
3. Human capital/adaptability to employment-based selection criteria

These three trends are intricately connected and it would be easy to see them as a single theme. However, I will argue that each is distinct and must be understood in its own right.

3.1.1 Overseas Selection to In-Canada Selection

From the 1960s to the early years of the 21st century, Canada’s skilled immigrant selection system (and indeed almost its entire immigrant selection regime) was based on selecting immigrants from abroad. Applicants in other countries would apply for permanent resident visas, would submit documents proving that they met the criteria and perhaps attend interviews, would be issued visas upon approval and would travel to Canada, becoming permanent residents (previously “landed immigrants”) upon arrival in Canada.
The past decade has seen a major shift towards in-Canada selection of skilled immigrants. This has meant picking immigrants from among people who are already in Canada as temporary residents. The move to in-Canada selection has also extended into other classes such as some elements of the family class and others. Several of the legal changes noted in the previous chapter have facilitated this shift, including the provincial nominee programs and the Canadian Experience Class (neither of which require that applicants be in Canada in order to apply, but both of which allow and facilitate it).

In-Canada selection has meant two different things. First, it has meant moving the actual decision-making process onshore for the first time in decades. Second, it has meant selecting immigrants from the pool of people who already in Canada as temporary residents. The two trends are related but distinct.

The move to in-Canada selection has come about through both legislative and operational changes. While IRPA still requires that most immigrants be issued visas (which can only legally be issued outside of Canada), there are some limited exceptions such as in-Canada spouses, humanitarian and compassionate cases in Canada and live-in caregivers. There are also additional options for in-Canada landing even for some successful applicants who have been issued visas outside of Canada, for example for those holding work permits in Canada. Furthermore, even those who are not eligible for in-Canada landing as permanent residents will now increasingly have their applications processed in Canada due to a series of logistical rearrangements of CIC’s global processing network. The creation of the Centralized Intake Office in Sydney, NS and inland processing centres in Vegreville, AB, Mississauga, ON and Ottawa, ON have allowed for most immigrant selection work to be completed in Canada, and these domestic expansions have been matched with a scaling back of CIC’s international operations including the closing of numerous visa offices and staff reductions in others.

In-Canada processing makes increasing sense when the prospective immigrants are in Canada, and applying from within Canada has become more straightforward as processing has moved home to Canada: the two trends have continued to support and perpetuate each other. However, some of the recent moves towards onshore selection risk contravening s.11(1) of the Act which
requires that foreign nationals apply for visas “before entering Canada.” While this may appear to be simply semantics, it does reflect the rapid and haphazard way in which the system has been changed without full consideration of the implications. Indeed, CIC has sought to circumvent s.11(1) even in some inland processing cases by having a visa office outside of Canada make the final formal “decision” to issue a visa, for example with the Canadian Experience Class.

3.1.2 One-Step to Two-Step Immigration

Closely related to the move to in-Canada selection is the transformation of skilled immigrant selection from a single decision made at a visa office to a series of at least two, and often many, decisions leading ultimately to permanent residence over a period of several years.

Whereas prospective immigrants used predominantly to apply from overseas before ever having come to Canada and were invited to travel to Canada to become permanent immigrants upon approval, increasingly those wishing to migrate to Canada now come first as temporary foreign workers or foreign students. Once they are here, with work permits or study permits supported by their employers or schools, they then have the opportunity to apply for permanent residence from inside Canada. This means that immigration has become a two-stage process: first, coming to Canada on a temporary or trial basis, wherein they have limited rights and privileges and a finite duration, and second, applying for permanent residence usually after several years in Canada either working or studying. This was the process for many years for live-in caregivers, but this has now been extended to include increasing numbers of highly skilled economic immigrants.

Although I have called this a two-step process for convenience, this is in fact a misnomer: there are many steps in this journey for most high skill immigrants. In many cases there will first be a decision by Human Resources and Skills Development Canada to issue a positive labour market opinion to a prospective employer in Canada allowing them to employ a temporary foreign

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IRPA, supra note 87, s.11.(1).
worker. There will then be the twin decisions to approve a work permit and issue a temporary resident visa (two legally distinct decisions that are always made in tandem) to the foreign national. There will then be separate decisions at a port of entry to admit the foreign national as a temporary resident and issue the work permit (even though it has been approved in principle at a visa office, it still must be issued at a port of entry pursuant to s.200(1) of the IRP Regulations\(^\text{158}\)). There will then almost always be further decisions to issue new labour market opinions, and extensions of work permits and temporary resident status, often once every year while the foreign national works in Canada accumulating enough experience to qualify for permanent residence. Finally, there will be a decision made on an application for permanent residence. In the case of those coming to Canada first as foreign students, a whole extra layer of decisions is added before those related to work permits I have just described. In fact, then, the “two-step” process often involves as many as dozens of separate decisions made over the course of several years, each subject to the discretion of officers and the uncertainty of opaque bureaucratic processes.

The two-step immigration process is a dramatic change both to Canadian immigration law and to Canadian society in general. By introducing an interim stage in the immigration process, the new model has both created and fed from a large pool in Canada of what we might call prospective immigrants (never mind prospective Canadian citizens) who often live in Canada for many years with limited rights and privileges. Where the path to Canadian citizenship used to involve a single immigration step, full permanent residence status upon arrival, eligibility for citizenship after three years and citizenship perhaps a year later, the new path can often involve four years of university as a foreign student, a year of work as a temporary foreign worker before applying for permanent residence, another two years as a temporary foreign worker while awaiting permanent residence processing, then two to three years before citizenship eligibility, then finally two to four year awaiting citizenship. A four year in-Canada journey to citizenship has become a more than 12 year gruelling ordeal for many, much of it on very tenuous temporary status, or what Luin Goldring and Patricia Landolt have termed “precarious status.” These scholars have identified numerous problems in long term outcomes for those who have experienced periods of precarious status, and we have yet to understand its full implications.

\(^{158}\text{IRPR, supra note 96, s.200(1).}\)
The presence of a large pool of temporary residents creates numerous other challenges, including for civic engagement. Canadian jurisdictions with large temporary resident populations (and also permanent resident non-citizen populations) will often be politically underrepresented due to their ineligibility to vote in local, provincial or federal elections. Temporary residents are also subjected to strict controls on their movement, limiting their ability to adapt to changes in the labour market. Finally, they are highly vulnerable to removal from Canada, preventing them from putting down roots and fully engaging in the communities where they live. A temporary resident population of several hundred thousand people therefore presents significant nation-building challenges. A temporary resident population that is expressly a pool of potential permanent immigrants represents a paradox of those identified as potential future Canadians but held in immigration purgatory for often more than a decade, all the while with limited rights and limited opportunities for integration and engagement.

3.1.3 Human Capital/Adaptability to Employment-based Selection

The move away from the human capital model outlined in chapter 2 has both spurred and been perpetuated by the above-noted trends. This third of three parallel trends is the primary focus of this paper, but it can only be fully understood in conjunction with the other two. I will discuss this synergy in greater detail below.

As noted above, there are at least three concurrent trends that have defined the early 21st century selection of skilled immigrants: the moves to in-Canada selection, the two-step immigration process and the abandonment of the human capital model in favour of an employment-based selection model. These three trends have continued to reinforce and perpetuate each other, and each makes the others increasingly necessary.

It is difficult to determine whether all three were intended, or if one forced the development of the others. Certainly the expansion of the temporary foreign worker program and the growth in the foreign student population predated all of these changes. By the mid-1980s, the number of temporary workers entering Canada each year exceeded the number of permanent immigrants for
the first time, and by the late 2000s this became the new “permanent” reality. However, the discussions around the drafting and implementation of IRPA made little or no mention of this population, or of any effort to recruit from it. The first explicit connections drawn between high skilled temporary foreign workers and permanent residence came from the provincial nominee programs, both in encouraging employers to nominate current employees for permanent residence and in supporting work permit issuance to nominees outside of Canada.

Although the provinces had entered the field in the late 1990s, it was not until the election of a Conservative government in 2006 that the federal government began to link skilled temporary foreign workers and skilled permanent immigration directly and openly in any significant way. The most obvious example of this has been the Canadian Experience Class, starting in 2008, which expressly draws from current and former high skill temporary foreign workers (and previously foreign students).

3.2 The Privatization and Downloading of Permanent Resident Selection

A significant consequence of the move to an employment-based model of skilled immigrant selection has been the downloading and privatization of selection decisions. On one side, provinces have increasingly occupied the space previously reserved for the federal government in selecting immigrants. Through the various provincial nominee programs, provinces carry out selection decisions while the federal authorities limit their input for the most part to assessing medical, criminal and security admissibility. With the provinces now selecting almost 12% of economic immigrants in 2011 (not counting dependents), this represents a significant loss of authority and decision-making power on the part of the government of Canada.

On the other side, and perhaps more significantly, immigrant selection has effectively been downloaded to non-governmental actors. First, most of the new immigrant selection mechanisms are recruiting prospective immigrants from the temporary foreign worker pool already in Canada. These people already hold work permits issued to work for specific
employers, and they have been preselected by those employers. Although the federal government maintains selection authority over many skilled immigrants (in the Canadian Experience Class and the Federal Skilled Worker Category, primarily), by the time officers make any decisions about eligibility the pool of prospective applicants has already been limited by who holds and employer-supported work permit. Thus, employers are making the first and perhaps the most important decision about who will ultimately immigrate to Canada.

Universities and colleges are also playing a significant and growing role in immigrant selection. Foreign students are issued study permits on the basis of their acceptance to particular post-secondary institutions. Their Canadian studies then open avenues to permanent residence – either directly, through certain provincial programs or the federal PhD stream, or indirectly by allowing them to obtain post-graduation work permits which then open employment-supported avenues to permanent residence. In both situations, the educational institutions are making the initial decisions about who comes to Canada to study, which then sets in motion of multi-year chain of events that may ultimately lead to permanent residence and by necessity excludes those who have not been accepted for study in Canada.

The privatization of skilled immigrant selection has significant implications for public policy and nation-building in Canada, and these implications are only just now starting to be studied and are as yet poorly understood. In her article on the rise of Canada’s temporary foreign worker population and the move to the employment model of immigrant selection, Salimah Valiani argues that “an employer-driven immigration system is unlikely to provide for the long term needs of building a stable labour force and socially inclusive society in Canada.”

Ultimately the key problem with employers and schools pre-selecting skilled immigrants is one of competing objectives. As Naomi Alboim and Karen Cohl note, “While the involvement of

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these two sectors is welcome, they do not have the national interest as their primary mandate or objective in selecting people who will ultimately become Canadian citizens.\footnote{Naomi Alboim and Karen Cohl, “Shaping the Future: Canada’s Rapidly Changing Immigration Policies”, online: <http://www.maytree.com/policy> at 18 [Alboim and Cohl].}

3.3 The Rise of Low-Skill Workers and the Disconnect from the New Selection Model

An interesting anomaly in the move to in-Canada employer-based selection and the two-step immigration model is the massive growth in the past decade in the numbers of low-skill temporary foreign workers in Canada. Low-skill workers for this purpose are defined as those issued work permits to work in occupations classified as National Occupational Classification C and D\footnote{Human Resources and Skills Development Canada, Reference, “National Occupational Classification 2011” (17 December 2012) online: HRSDC <http://www5.hrsdc.gc.ca/NOC/English/NOC/2011/Welcome.aspx>}. – in other words, occupations that require little or no formal post-secondary training.

Until 2002, there were relatively few low-skill temporary foreign workers in Canada, and few options for them to obtain work permits, never mind permanent residence: in December 2002, the year the Low-Skilled Worker Pilot was introduced, there were just over 32,000 low-skill temporary foreign workers in Canada.\footnote{Facts and Figures 2011, supra note 1.} Following the 2002 introduction of the Pilot Project, this population began to increase dramatically and quickly. By December 2009 there were over 94,000 low-skill temporary foreign workers in Canada, representing almost half of the total temporary foreign worker population with specified occupations\footnote{Ibid.} although these numbers are disputed and depend on the way in which they are calculated.

The increase in low-skill workers presents a paradox: in the new world of selecting immigrants from the temporary resident population, low-skill workers are largely left behind. High-skill and low-skill workers are distinguished from each other in a number of ways, but the most significant of these by far is the lack of direct route to permanent residence for most low-skill workers. With the exceptions of live-in caregivers and a small number of other low-skill workers eligible
under a few limited provincial immigration programs, low-skill workers are not eligible to apply for permanent residence. They do not qualify as Federal Skilled Workers, are ineligible for the Canadian Experience Class and do not meet the requirements of any employment-based immigration programs in most provinces, regardless of arranged employment in Canada or other attributes.

That the rise in low-skill workers has come at the same time as the move to selecting permanent residents from the temporary resident population is highly problematic, as this group has been allowed to grow dramatically while maintaining its “permanently temporary” status and ensuring that low-skill workers never have the opportunity to participate fully in Canadian life. In addition to issues of physical segregation while they are here working,164 low-skill workers are permanently legally segregated by preventing them ever from becoming permanent immigrants or ultimately citizens. This “bifurcated labour” model165 is not unique to Canada, but it represents a new reality for this country. There is an “increasingly formalized distinction between high-skilled and low-skilled work,” and the key to this distinction is access to permanent residence.166

The Canadian Bar Association recommended in a 2006 review of the Low-skilled Worker Pilot Project that low-skill workers also have access to permanent residence167 but this recommendation went for the most part unheeded. Other commentators have advocated for the abolition of the Pilot Project completely on the basis of the inability of low-skilled workers to apply for permanent residence.168 In any case, this disconnect remains and is getting worse as the population of low-skill workers continues to grow.

3.4 Lack of Data Showing Better Long-term Outcomes under the New Model

Canada has only recently moved to a primarily employment-based skilled immigrant selection model, so there is a limited field of data on outcomes for these workers. Furthermore, few other countries have used both models in a way that allows for meaningful comparison within the same system (comparisons across different countries will necessarily be complex due to different labour economic and social conditions in each country). In any case, even in other countries there appears to be little information about long term outcomes. It is therefore difficult to determine the long term outcomes for immigrants selected under the employment model, and governments have largely speculated about long term results based on short term data.

A 2010 study conducted by CIC noted that outcomes under the Federal Skilled Worker program under the new open-occupation rules introduced with IRPA (but before the introduction of Ministerial Instructions limiting the overseas selection of skilled workers under the points system) were better than those under the pre-2002 rules which had a list of approved occupations for applicants after six months and after three years.\(^{169}\) This suggests that selecting for general adaptability criteria rather than immediate labour market shortages results in better outcomes. While the study also notes better outcomes for those who were also awarded arrangement employment under the post-2002 rules, the study only extends to three years post-landing. The study did not look at a longer period of integration, and also did not compare the Federal Skilled Worker outcomes to any employment-based programs such as the Provincial Nominee Programs.

A 2011 BC study of economic outcomes for BC nominees compared outcomes to other skilled immigrants also noted better short-term outcomes for nominees.\(^{170}\) However, the study relied on data up to 2006; given that the first nominees were landed in BC around 2000, this is a maximum of six years of data, and the results are not separated by years in Canada so it is difficult to tell what the long-term outcomes have been for nominees selected on the basis of arranged

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\(^{169}\) FSW Evaluation 2010, supra note 128.
employment in BC. This study also does not extend to comparison with those landed under more recent initiatives such as the Canadian Experience Class.

Numerous other concerns have been raised with respect to employment-based permanent immigration schemes. For example, Salimah Valiani notes that the new system is aggravating employer control over workers, by holding out “carrot” of possible permanent residence which forces foreign workers to accept unsatisfactory working conditions in order to achieve the ultimate goal of permanent immigration.\textsuperscript{171} She argues that this is an ongoing overall shift in the Canadian economy in favour of employer “flexibility” which has undermined full employment and workers’ rights.\textsuperscript{172} In a policy paper from the Europe’s Migration Policy Institute, Demetrios Papademetriou and Madeleine Sumption also note that employer-selected immigrants generally come first as temporary workers (as they do in most cases in Canada), making them vulnerable to exploitation in the initial period.\textsuperscript{173}

Nandita Sharma has written extensively on the vulnerability of temporary foreign worker populations. She states, for example, that the temporary foreign worker program “operates as a system of indentured labour recruitment that allows both the Canadian state and employers in Canada to exploit the legislated vulnerability and lack of entitlements of those placed in the state category of non-immigrant.”\textsuperscript{174} She argues that the system is designed to maintain an underclass of non-Canadians who are legally disentitled both to state protection and also to many publicly-funded benefits and services. I note, however, that Sharma’s research focuses primarily on lower-skilled workers (who make up the minority of temporary foreign workers)\textsuperscript{175} from poorer countries (the source countries for a minority of temporary foreign workers).\textsuperscript{176} Nevertheless, while the dynamic may be different for higher-skilled workers from developed countries who

\textsuperscript{171} Valiani, supra note 159 at 62.
\textsuperscript{172} Ibid. at 57.
\textsuperscript{173} Papademetriou and Sumption, supra note 17 at 248.
\textsuperscript{174} Nandita Sharma, “Immigrant and migrant workers in Canada: labour movements, racism and the expansion of globalization”, (Spring/Summer 2002) Canadian Women’s Studies 18, online: Proquest <http://www.proquest.com> [Sharma].
\textsuperscript{175} Facts and Figures 2011, supra note 1, but see Foster, supra note 50 (suggests low-skill workers have now surpassed high-skill workers).
\textsuperscript{176} Facts and Figures 2011, supra note 1.
may be less socially and economically vulnerable, it remains true that all temporary foreign workers have fewer legal protections and entitlements than citizens and permanent residents.

In addition to the problematic outcomes for individual immigrants, other concerns arise out of the existence of a large temporary resident population itself. This issue has been the subject of increasing scholarship in Canada in a variety of fields. For example, concerns have been raised about long term distortions to the labour market including downward pressure on wages and a lack of investment in training and apprenticeship, exploitation of temporary foreign workers, democratic participation, and the long term sociological impacts on workers of experiencing periods of “precarious status.” Regardless of whether or not these concerns are well-founded, there does not appear to have been sufficient consideration given to them by policy-makers in the context of the huge growth of the temporary resident population.

3.5 Loss of Control over the Selection System

Ironically, as the Minister of Citizenship and Immigration has centralized some aspects of decision-making power in his own office, the ongoing shift from overseas selection to selection from the temporary resident stream has been accompanied by a wholesale downloading of many of the most important selection decisions from the federal government to provincial governments, employers and schools.

The federal government has maintained jurisdiction over selection in the Federal Skilled Worker and Canadian Experience Classes, but the former accounts for a smaller and smaller percentage of the total skilled immigrant stream. For example, Federal Skilled Workers and dependents

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178 Byl, supra note 151.
179 Kyle Hyndman, Why Toronto Should Extend the Municipal Franchise to All Legal Residents: A Theoretical Primer”, [unpublished].
(accounted for 53.6% of total immigrants in 2002, but just 35.7% in 2011.\textsuperscript{181} With the 2013 changes, this percentage will necessarily decline much further. Much of this difference has been made up by the growth of provincial nominee programs and the Canadian Experience Class, which together went from 0.9% of total immigrants in 2002 to 17.8% in 2011.\textsuperscript{182} Furthermore, by the time the federal government gets to assessing applicants even in those two categories, most of these applicants have already been effectively pre-screened by employers and schools. This means that the number of people actually selected entirely by the federal government, without input from some other entity, is now quite small and is shrinking.

While a detailed analysis of the statistics is needed, it is my estimate that in 2011 only about 32,000 immigrants annually were deliberately chosen by the federal government alone based on their skills and qualifications, when accompanying family are excluded.\textsuperscript{183} Very recent changes to the Federal Skilled Worker category in 2013 will limit this number much more, to just 5000 per year.\textsuperscript{184} This is a very dramatic decline, and makes the federal selection criteria, and our vigorous national debates about them increasingly irrelevant.\textsuperscript{185} It is therefore clear that we need a much broader conversation about how we select immigrants, about the role of temporary residents, the balance between high- and low-skilled immigrants and more.

As recently as 2012, CIC described the Federal Skilled Worker Program in its Annual Report to Parliament as “Canada’s flagship program for selecting foreign skilled workers.”\textsuperscript{186} However, even as this idea continues to be promoted publicly, it is decreasingly accurate. Far from being the flagship program, the Federal Skilled Worker category is now little more than a tiny sideshow in Canada’s overall immigration program; Canadians just haven’t realized it yet. Take for example the extensive special series on immigration in the Globe and Mail in 2010: articles and online tools invited readers to examine critically the points grid to determine whether it was

\textsuperscript{181} Facts and Figures 2011, \textit{supra} note 1.
\textsuperscript{182} \textit{Ibid}.
\textsuperscript{183} I have reached this estimate by including only the FSW category, removing the estimated 13% who have arranged employment in Canada and removing accompanying family members.
\textsuperscript{184} Ministerial Instruction 8, \textit{supra} note 142.
\textsuperscript{185} See e.g. “New immigration points system will favour younger workers, language skills”, \textit{The National Post} (19 December 2012) online: National Post: <http://www.nationalpost.com>.
\textsuperscript{186} CIC Annual Report 2012, \textit{supra} note 107 at 11.
weighted appropriately to select the best immigrants for Canada. Instead, the series should perhaps have been asking whether the points system was the right model at all.

3.6 Disconnect with Settlement Services

While Canada’s settlement services model has long focused on helping new permanent residents integrate into Canadian society and economic life, a significant number of new permanent residents are now arriving first as temporary residents, primarily temporary foreign workers. In many cases, they will spend several years in Canada before becoming permanent residents. However, despite the changes to immigrant selection outlined above, settlement services continue to focus almost exclusively on new permanent immigrants.

There exists a significant disconnect between the new selection model, including the two-step immigration process for skilled immigrants described above, and the eligibility rules for most settlement services, and the Federal Government does not appear to see this as a priority. Indeed, CIC’s 2012 Annual Report to Parliament does not even make mention of temporary residents in its chapter on settlement services and outcomes. Now that a significant number of new immigrants are being picked from temporary resident streams, many of these new immigrants (and perhaps soon even a majority of skilled economic immigrants) will have in fact already been in Canada for a number of years by the time they become permanent residents. At least among skilled principal applicants, most have probably already learned an official language (a requirement for almost all schools and employers), have had relevant credentials assessed (a requirement to work in regulated professions), have found homes and work, and have built local support networks. Furthermore, they have done so with almost no federal government support, as the costs of this integration are instead being borne by the employers and schools who initially recruit them as temporary residents, as well as by migrants and their families.

themselves. In other words, the settlement services model has become desperately out of touch with the new realities of immigration, and is missing a large and growing segment of the people who would benefit from these services. By the time those immigrants are eligible for government-funded services, in many cases they will no longer need them – although they may require different services that have not yet properly been evaluated.

One could argue (and indeed, Minister Jason Kenney has explicitly stated) that temporary workers are not intended to come to Canada permanently and therefore no settlement services are warranted. For example, in introducing minor reforms to the temporary foreign worker program in May 2012, he stated that “these reforms will require that greater efforts be made to recruit and train Canadians to fill available jobs. They will also help ensure the Temporary Foreign Worker Program is only used as intended—to fill acute skills shortages on a temporary basis.”

However, the facts tell a different story. The creation of numerous categories, both federal and provincial, specifically targeting those who are currently or have previously been working or studying in Canada, and the statistics on how many of these workers and students are actually applying, suggest that governments both know and intend that many of these people will apply for permanent residence. If this is pool of people is a known and intended source of permanent immigrants (one that is rapidly become the source for the majority of immigrants), it seems disingenuous to suggest that they are not deserving of settlement services on the basis that they are only here temporarily. Not only do many of them stay permanently, but they are precisely the population from which permanent residents are increasingly drawn.

In some cases, provincial governments and non-governmental agencies have stepped into the breach. For example, organizations like Vancouver’s MOSAIC, Toronto’s Kababayan, the YMCA and others provide limited services to temporary foreign workers and students out of their own budgets. In CIC consultations on the Immigrant Settlement and Adaptation Program (one of the main immigrant settlement services programs), numerous service providers noted the

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gap in services to temporary residents and indicated a desire to serve this population.\textsuperscript{192} Provincial governments, which provide most settlement services through local organizations but with federal funding pursuant to federal-provincial immigration agreements, have generally excluded temporary foreign workers and students from most settlement services such as language training.\textsuperscript{193}

\section*{3.7 Failure of Nation-Building}

The devolution of selection to almost anyone but the Federal Government has serious implications for Canada’s nation-building project. Immigration is certainly a tool for addressing labour market needs. However, it is also a way of addressing demographic imperatives and also for continuing to construct a national identity. As noted above, employers and schools do not necessarily have the national interest at heart (nor, perhaps, should they) when they are recruiting temporary workers or admitting foreign students. Their objectives are narrower and of a short-term nature. However, the change to an employer-based model has effectively made these non-governmental actors, particularly employers, the first gatekeepers of the immigration system. When skilled immigrant selection mechanisms are picking their candidates almost exclusively from the pool of pre-selected temporary residents, the loss of a long-term national perspective becomes both obvious and serious.

Even in the limited situations where provinces are selecting skilled immigrants without employer involvement, they are necessarily doing so with a mind to fulfilling local objectives – indeed, the ability to do so is the raison d’être for the provincial nominee programs in the first place:

“[f]ederalism presupposes the existence of national as well as subnational interests, identities, and loyalties, which can lead to multiple perspectives on immigration objectives and selection

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preferences by different communities and levels of government." Canada should not be relying on provinces to have the national interest at heart; this is the role of the national government in any federation.

In a country where immigration policy and nation-building are inextricably linked, and have been since the earliest days of European colonization, an abdication of responsibility for a large segment of immigrant selection represents a failure of the national government to fulfil this important role. As Nandita Sharma puts it, “[b]eing a "Canadian citizen" has been integrally connected to the historically shaped identity of whom, or which bodies, can be inscribed as Canadian and the differential rights that are accrued to these "Canadians" and those constructed as the "non-Canadian"-Other.” Assuming a linear connection between immigration and ultimate citizenship, there is then also a direct connection between permanent immigration and building the Canadian nation.

The Canadian Council for Refugees has also commented on the nation-building implications of reliance on temporary workers, noting that immigration status is one of the determinants of how readily a new resident is able to integrate with her or his new community:

> The shift from nation building to temporary migration has serious implications for the workers themselves and for Canadian society as a whole. Resorting to temporary permits is creating a class of vulnerable and disposable workers: their rights are not fully protected, making them vulnerable to exploitation. Without a permanent status, they cannot integrate into Canadian society and contribute to their full potential.

Even though the majority of temporary foreign workers and many foreign students eventually do have access to permanent residence, the ongoing stock of temporary foreign workers and students without full legal rights creates a large and permanent, if revolving, underclass of residents who cannot participate fully in Canadian civic life. The larger this class grows, the more serious the implications are for Canada’s ongoing ability to build itself as a prosperous and multicultural nation.

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194 Baglay, supra note 98 at 122.
195 Sharma, supra note 174 at 3.
Chapter 4

A Flawed Law-making Process

This final chapter will revisit in detail the law-making process that has given rise to the massive changes in skilled immigrant selection in the new millennium. I will argue that given the extent of the changes, the legal mechanisms employed to create these changes have been inadequate and have led to a deficit in legal accountability and democratic accountability.

Canada is in the process of undergoing one of the most significant shifts in immigration law and policy since the 1960s and 1970s. However, this shift has gone almost unnoticed and in the absence of any meaningful public debate. Unlike the last generation of changes, this time there has been no White Paper or Green Paper; there have been few and limited public consultations; there has been a troubling absence of public discussion or consensus; and worst, there has been hardly any debate in Parliament to set the stage for sweeping legal and policy changes. In a country where immigration is generally agreed to be a central feature of our society, it is difficult to believe that such change has happened almost without any debate or even public attention. It is therefore worth investigating the legal mechanisms that have facilitated these changes and the problems to which they are giving rise.

The pace of change in immigration law and policy has accelerated steadily since the enactment of *IRPA* in 2002. Some of these changes have been outlined in the previous chapters. Particularly since 2006, with the election of a Conservative government and the appointment of Jason Kenney as Minister of Citizenship, Immigration and Multiculturalism, change has been the only constant. While legal and policy changes have perhaps been the most profound in terms of skilled immigrant selection, they have touched almost every aspect of immigration and citizenship.

One interesting measure of the pace of change is the number of Operational Bulletins issued each year. Operational Bulletins are used by Citizenship and Immigration Canada to inform front-line officers and stakeholders about important changes in the law or policy, and are published online.
as they are issued. We can see the accelerating speed of change by looking at the growing number of these published between 2006, the year the Conservatives were first elected with a minority government, to the present:

![Annual Operational Bulletins since 2006](image-url)

**Figure 2: Annual Operational Bulletins since 2006.**

This represents a dizzying number of legal and policy changes – in 2012, almost two a week. During this same period, at least 24 Operational Bulletins related directly to skilled permanent residence applications, although many more dealt with temporary foreign workers, students and other related issues. While a review of the list shows that a small number of these Operational Bulletins were issued as a result of legislative changes or court and tribunal decisions, the vast majority were advising of changes in regulations, Ministerial Instructions or departmental policy.

### 4.1 Framework Legislation

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IRPA was always explicitly intended to be framework legislation, much like its predecessor, the  
Immigration Act, 1976. As then-Minister Elinor Caplan put it in addressing the Commons  
Standing Committee on Citizenship and Immigration:

Most people have long understood and accepted the need for framework legislation  
like—I would point out—the immigration legislation currently enforced in this country.  
Concerns were nonetheless expressed underlining the importance of including all  
fundamental rights and and [sic] core policies in the legislation, that is, that they be made  
explicit in the act itself, rather than in regulations.199

This means that the act was supposed to provide the key principles by which the details of  
immigration law and policy would be crafted, and those details would then be left to regulation.  
This would allow successive governments to choose how best to achieve the stated goals of  
Canadian immigration law as set out in the Act, and change approaches based on changes in the  
economy and new understandings of how the system works. However, while the drafters of  
IRPA made very specific statements about the principles of skilled immigrant selection, they did  
not enshrine any of these principles in the Act itself, and chose to leave much more than simply  
details to the regulations.

Then-Minister Caplan claimed, in defending the bill that later became IRPA, that “[a]t the very  
outset Bill C-11 outlines the key objectives of the immigration and refugee programs.”200

However, as noted above, the objectives in the Act are so general that they provide almost no  
guidance whatsoever as to the principles upon which skilled immigrant selection should be  
based.

Given the lack of direction provided by the Act, many observers have also noted the lack of  
legislative oversight of both the temporary foreign worker program201 (which has created the in-  
Canada skilled immigrant pool) and of the selection system itself.202 This lack of legislative  
structure has opened the door for lawmaking that is both innovative and highly problematic.

199 House of Commons Debates, 37th Parl, 1st Sess, No 021 (1 March 2001) at 1520 (Hon. Elinor Caplan) at 0915.  
200 Ibid.  
201 See e.g. Byl, supra note 151 at 97, and Delphine Nakache, “Temporary Workers: Permanent Rights”, (Spring  
202 Mario Bellissimo, “Law-Making Innovation in the Canadian and International Immigration Context:
4.2 Ministerial Instructions

One lawmaking innovation that is particularly troubling is the use of Ministerial Instructions. In 2008, Parliament passed amendments to IRPA to add section s.87.3, which gave the Minister of Citizenship and Immigration the ability to make significant changes to immigrant selection rules by way of instructions, without further legislative or even regulatory amendment; the only requirement was that the instructions themselves be published in the Canada Gazette. This meant that no additional parliamentary debate, even at committee, was required in order to make further changes to many aspects of how skilled immigrants are selected. The amendments also insulated decisions made pursuant to Ministerial Instructions from review by the Federal Court. Now both the making of immigration law and decisions made pursuant to the new rules were subject to unreviewable ministerial fiat. Naomi Alboim and Karen Cohl aptly described the 2008 legislative amendments as a “sea change” in immigration law-making.203

This power has not been merely theoretical: indeed, no fewer than ten sets of sweeping ministerial instructions have been issued in the five years since s.87.3 was added to the Act, covering a range of topics but focused primarily on skilled permanent immigrant selection:

MI-1 (November 2008): Limited eligibility to apply as a federal skilled worker to (a) those whose applications were supported by an Arranged Employment Opinion, (b) those with experience in one of a list of 38 approved occupations, and (c) those currently working or studying in Canada with appropriate permits. MI-1 also made the new rules retroactive to February 2008, arbitrarily “returned” post-February applications that didn’t meet the new rules, and moved pending applications from before that date to the back of the queue.

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203 Alboim and Cohl, supra note 160 at 9.
**MI-2 (June 2010):** Removed the third category of eligible applicants (those working or studying in Canada), reduced the eligible occupations to 29 and set a cap of 20,000 applicants per year for those applying on the occupations list; those exceeding the cap were simply returned to the applicants, with no right of review.

**MI-3 (July 2011):** Reduced the global cap for occupations list applicants to 10,000, with a 500 cap per occupation. MI-3 also froze the federal Entrepreneur category (this freeze has continued to this day, effectively killing the Entrepreneur category entirely).

**MI-4 (November 2011):** Created a new stream within the Federal Skilled Worker category for foreign students completing PhD degrees at Canadian universities, capped at 1000 per year. MI-4 also froze the parents and grandparents category within the family class.

**Super Visa MI (December 2011):** This set of Ministerial Instructions was not numbered in the same sequence as the rest. It created a new type of long-term multiple-entry temporary resident visa to facilitate visits to Canada by parents and grandparents of Canadian citizens and permanent residents, as a partial compensation for the freezing of their ability to apply for permanent residence.

**MI-5 (June 2012):** Suspended most of the Federal Skilled Worker category, returning all new applications except from those with Arranged Employment Opinions. MI-5 also suspended the Federal Investor category.

**MI protecting vulnerable foreign workers from the risk of abuse and exploitation in sex trade related businesses (July 2012):** Another un-numbered MI, which prohibited issuance of work permits to those seeking to work in strip clubs, escort services or massage parlours and required adding a condition to “open” work permits prohibiting work in any of these occupations. This is a dramatic shift from the situation just a few years earlier where there was an occupation-specific national labour market opinion.
issued for exotic dancers, allowing them to apply directly for work permits without the need for position-specific labour market opinions.

MI-6 (January 2013): Extended the suspensions of the Federal Skilled Worker category, the Federal Entrepreneur category and the Federal Investor category and provided for a cap of 3000 in the new Federal Skilled Trades Program.

MI-7 (March 2013): Created the Start-Up Visa Program, as a replacement for the long-frozen Federal Entrepreneur category. This was created under the new s.14.1 of IRPA which allows for the creation of entirely new economic immigration categories by way of ministerial instructions.

MI-8 (May 2013): Restarted the Federal Skilled Worker category and established an overall cap of 5000, with a cap of 300 applicants in each of 24 eligible occupations, plus 1000 for the PhD stream and 3000 for the Skilled Trades stream. MI-8 also continued the freeze on the Entrepreneur and Investor categories.204

Ministerial Instructions have been used to make very significant changes to the way immigrants are selected. In addition to implementing dramatic changes to family reunification (one of the core objectives set out in s.1 of IRPA) and barring whole classes of people from obtaining work permits, these Instructions have been used to effectively eliminate economic categories by “temporarily” suspending new applications in various categories. Most significantly, though, Ministerial Instructions have been used to make changes to skilled immigrant selection to such a degree that the very philosophical underpinning of the immigration system has been altered.

A further legislative amendment was passed in 2012 that facilitated retroactive application of Ministerial Instructions, adding to the arbitrary nature of this form of lawmaking.205 To make matters worse, this amendment was introduced by way of the omnibus Budget Implementation

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205 Alboim and Cohl, supra note 160.
In other words, every stage in immigration lawmaking has been insulated from debate, scrutiny and review: legislative changes have been brought in using dubious omnibus legislation with limited debate; those changes have then given lawmaking power to the individual minister, not subject to debate or review; and the individual case decisions made pursuant to those instructions are generally not subject to review.

It might be argued, and indeed Minister Kenney has repeatedly argued, that the Minister needs to maintain the flexibility to change details of immigrant selection rules quickly in order to respond to the rapidly evolving needs of the Canadian economy and society. However, even if one were to accept this argument, this position becomes much more problematic in a system where the enabling legislation does not set out the general principles of skilled immigrant selection. In the absence of a guiding philosophy, the Minister is free to make fundamental changes to the overall philosophy of immigrant selection without debate and without review. Given this freedom, the Minister has done exactly that.

Canada is not alone in extending ministerial law-making power in immigrant selection: Australia, the UK and the US have to varying degrees made use of ministerial authority to make sweeping legal or policy changes in the immigration field, although in very different ways.

Australia is perhaps the closest comparison on this issue, where amendments to the Migration Act, 1958 give the minister the power to issue “legislative instruments” that have the ability to set processing priorities, change eligibility rules and more. Just as in Canada, the government has sought to insulate legislative instruments made under these provisions from parliamentary debate and from judicial review. Canada’s government seeing its immigration competitors centralizing lawmaking power with the executive must present a tempting example to emulate.

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206 Ibid. at 11.
208 Bellissimo, supra note 202 at 4-8.
209 Ibid. at 4.
4.3 Lack of Public Consultation or Debate

The last time Canada underwent major changes to skilled immigrant selection in the 1960s, the country engaged in a national debate on immigration law and policy. As mentioned in the first chapter, there were nation-wide public consultations, a detailed White Paper, parliamentary debate and, ultimately, a broad national and political consensus. The 1976 Act passed with unanimous support in the House of Commons and Senate. In the decades following, opinion polls repeatedly confirmed the value of obtaining this consensus and showed its durability, with ongoing support for Canada’s immigration program. For example, a 2011 study by Jeffrey Reitz examines the ongoing pro-immigration views of a majority of Canadians and explains it in part by the perception that immigration creates continued economic benefits for Canada.\textsuperscript{210}

The changes of the past decade have been equally significant. However, they have been marked by an overall lack of meaningful public consultation.\textsuperscript{211} There have been consultations on discreet issues, such as on tinkering with the points assessment for Federal Skilled Workers\textsuperscript{212} and some other issues, but little consultation on Canada’s overall approach to immigration. Non-governmental actors such as academics, the Canadian Bar Association and others have made some effort to engage in this debate but have largely been ignored by the federal government. There have been exceptions, such as in the case of CBA submissions on expanding permanent residence options for skilled temporary foreign workers which contributed to the formation of the Canadian Experience Class,\textsuperscript{213} but these have been few and far between and generally not solicited by the government. Consultations that have occurred have been limited by participants (some, such as the 2011 consultations on foreign workers were by invitation only and including only industry representatives),\textsuperscript{214} and others asked very limited questions.\textsuperscript{215}

\textsuperscript{211} CCR, supra note 196 at 1.
\textsuperscript{212} CIC Annual Report 2012, supra note 107 at 11.
\textsuperscript{213} Valiani, supra note 159 at 62.
One set of consultations did take place on the new Ministerial Instructions in 2008 and included some open-ended questions to both the public and stakeholders on what were the best indicators of success for skilled permanent immigrants.\(^{216}\) The consultation report found that having arranged employment in Canada was one, although not the most important, factor in determining success.\(^{217}\) However, “success” was not defined, and there was no differentiation between short-term and long-term outcomes. The report does note a preference for permanent immigration to meet labour shortages, rather than temporary foreign workers.\(^{218}\) Of course the changes of the following five years have shown that this preference has not been shared by the Minister.

CIC’s Consultations Annual Report 2010-2011 outlines the various public and stakeholder consultations conducted that year, a year in which numerous significant relevant changes took place, many of which are discussed in previous chapters. With respect to skilled permanent immigrant selection in particular, the report lists consultations conducted on:

- requiring federal skilled workers to have a minimum level of language proficiency;
- making the program more accessible to skilled tradespeople, technicians and apprentices;
- placing greater emphasis on younger immigrants who will adapt more easily and be active members of the work force for a longer time frame;
- redirecting points from work experience to other factors that better predict success in the Canadian work force; and
- reducing the potential for fraudulent job offers.\(^{219}\)


\(^{217}\) Ibid.

\(^{218}\) Ibid.

The individual report from that consultation notes also that even the questions asked about the arranged employment provisions were limited to discussions on how to reduce fraud, and not whether employers should have a role in selecting immigrants in the first place.\textsuperscript{220}

Consultations were held in the summer of 2011 on immigration levels and the mix between different categories. While not an obvious focus of the consultations, there was some feedback on facilitating the transition between temporary worker status and permanent residence. However, the consultation report is equivocal, simply noting opinions on both sides of the issue and making no clear recommendations on this issue, despite making recommendations on other issues.\textsuperscript{221} In any event, the continuing pattern of legal changes since 2011 does not demonstrate much if any deference to the results of these consultations.

Also in 2011, CIC conducted consultations on the Temporary Foreign Worker Program, although these were limited consultations with industry, with the public, law reform groups and others not invited. These consultations revealed a desire on the part of industry for options for permanent residence for lower-skilled workers, although again this does not appear to have been a primary focus of the discussions.\textsuperscript{222} In any case, this recommendation has also gone unheeded.

Indeed, just as the government was conducting consultations on tweaking the points assessment, it was effectively marginalizing the entire points system. The consultations appear to have been a distraction from the profound changes that were taking place at the same time, below the public’s radar. The 2012 report lists a similarly glaring lack of public consultation on the objectives or principles of skilled immigrant selection.

A cursory search of media sources on immigration issues reveals numerous articles on individual immigration issues – a high-profile deportation, a change to the parental sponsorship rules,
delays in citizenship processing – but almost nothing about the way in which skilled permanent immigrants are selected. The few articles calling for more open debate appear to go unheeded.\textsuperscript{223}

4.4 Limited Parliamentary Debate

There has been remarkably little debate in Parliament in the past decade on the objectives or guiding principles of skilled immigrant selection in Canada. Given immigration’s central role in defining Canadian identity, and the key role of skilled immigrants within the overall immigration regime, it is surprising indeed that Parliament has had very little role in leading the recent changes.

This is a marked change from the lead-up to the passage of \textit{IRPA}. In parliamentary debates and in committee, there was extensive discussion between 2000 and 2002 of the objectives of skilled immigration and the means of selecting immigrants. As noted in chapter 1, the Minister made it very clear that she favoured the human capital model of selection, and while there was discussion about the best ways of recruiting the “best and brightest” and most adaptable immigrants, there was a general consensus that selecting skilled immigrants for adaptability was a good thing. The Act and its accompanying regulations were introduced, reintroduced, consulted on and debated. The Canadian Bar Association and other organizations weighed in on the selection system and presented to the House of Commons and Senate Standing Committees on numerous occasions.

Once \textit{IRPA} became law, and particularly since 2006 with the election of a Conservative government, Parliament has been decreasingly involved in debating and establishing immigration law. A look at the tools used to keep law-making out of the public eye and out of Parliament suggests and intent to avoid debate.

One of these tools has been the use of omnibus legislation, whereby changes are made to immigration legislation as part of massive bills that affect many different areas of law, and given such generic titles as “budget implementation bills.” Opposition parties and the public are faced

\textsuperscript{223} See e.g. Haroon Siddiqui, “Canada needs a national debate on immigration”, \textit{The Toronto Star} (23 May 2013), online: TheStar.com <http://www.thestar.com>. 

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with analyzing hundreds of pages of highly technical legislation in which might be buried a few lines leading to changes in important aspects of immigration law. It is then impossible for opposition parties to oppose individual provisions without voting against an entire bill, usually presented as a confidence bill. This has served to reduce debate on important immigration law changes.

The fact that IRPA itself is “framework legislation” has allowed the government to make many significant changes by way of regulation, with no votes in Parliament. The government has not had to make any major legislative changes relating to skilled immigrant selection, other than the obvious one of giving the Minister the power to make law by way of Ministerial Instructions. Many important changes to skilled immigrant selection procedures have been made by regulation. Perhaps the most sinister of the changes, however, has been the use of Ministerial Instructions which completely insulates significant legal changes from any parliamentary debate whatsoever.

A notable exception to Parliament’s avoidance of the issue of skilled immigrant selection was the 2009 report of the Standing Committee on Citizenship and Immigration on temporary foreign workers. While not primarily focused on how permanent immigrants are selected, the report does address at length the issue of temporary foreign workers and their access to permanent residence. It is worth examining this report in some detail, both because it makes important findings and recommendations and also because it represents one of Parliament’s few serious forays into the skilled worker selection debate in the past decade.

The report takes the position that the huge growth in demand (and thus flow) of temporary foreign workers has come about for various reasons, but particularly because of problems with the permanent selection system – both processing delays and limitations on who qualifies: employers are unwilling to wait years to get the workers they want, and find the system unresponsive to their needs.

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More significantly, the report expresses opposition to the two-step immigration model whereby skilled workers come first as temporary workers and then apply for permanent residence. The committee felt that the temporary foreign worker program was not an appropriate tool for permanent immigrant selection. However, if it is to exist, then the report recommends that all temporary foreign workers have an avenue to permanent residence, not only higher-skilled workers. In the meantime, the report also advocates corresponding legal changes to allow lower-skilled temporary foreign workers to bring family members with them and for their accompanying spouses to obtain work permits, in line with current law and policy for higher-skilled workers.

It is important to note that most of the recommendations laid out in the report have been ignored. The temporary foreign worker program has continued to expand, low-skilled workers still have few options for permanent residence, temporary work is increasingly the favoured route to permanent residence, and the bifurcation of temporary foreign workers between high- and low-skill populations is just as pronounced as it has ever been.

4.5 Lack of Consensus

A marked difference between the changes of the past decade and those of the 1960s has been the lack of a general national consensus on the objectives and principles of immigration law. In the 1960s and 1970s, extensive public consultation and parliamentary debate, accompanied by detailed policy analysis, resulted in an almost unprecedented level of agreement on immigration, both on the part of parliamentarians and the public. The legislative changes of 1966 and 1976 enjoyed all-party support, and, despite extensive vigorous debate, did not experience significant opposition from any major sector of the public including employers, labour groups, cultural communities or otherwise.

226 Ibid. at 9.
227 Ibid. at 9.
228 Ibid.
In contrast, the most recent changes have not enjoyed any similar level of public buy-in or cross-party support in Parliament. The general consensus on the human capital model surrounding the passage of IRPA has largely evaporated and has been replaced by confusion and a general loss of public support for the government’s approach to skilled immigration, both temporary and permanent.

Just as effective consultation and open debate led ultimately to a consensus on immigration strategy in the 1960s, the lack of meaningful consultation and debate in the past decade has been accompanied by a lack of such national consensus, and falling support for immigration as a whole.

4.6  Bad Law

The deeply flawed lawmaking process that has led to Canada’s move away from the well-tested and widely-emulated human capital model of skilled immigrant selection has numerous implications, not all of which we are even aware of yet.

The first problem with making immigration law by fiat and largely without debate is that it may be leading to poorly-considered law. A lack of parliamentary or public scrutiny and a disregard for input from law reform experts such as the Canadian Bar Association and others (including Parliament) means that law is being made by a very small group of ideologues who may not have the larger picture in mind. While it is too soon to have extensive data on outcomes, it is far from assured that the new employment-based selection model will result in better long term economic or social well-being for Canada or for immigrants themselves.

Public consultation and parliamentary debate are not simply duties of government in order to fulfil its democratic obligations; they also result in input from informed stakeholders that may enhance lawmaking and result ultimately in better law.
The fact that there have been so many legal changes in the past decade (including many changes undoing previous recent measures) demonstrates the haphazard manner in which immigration law has been made: programs are introduced and then cancelled, pass marks and occupational lists are changed and changed back, offices are opened and closed, special work permit options are created and then eliminated. In the words of immigration lawyer Mario Bellissimo: “fast and furious reform seems to be outpacing an overall cohesive vision moving forward.” Indeed, almost 400 Operational Bulletins in less than seven years, many relating to skilled permanent immigrant selection, reflect a system that is changing so quickly that few Canadians can likely understand it, never mind foreign prospective immigrants.

Examining the new two-step employment model in particular, there is indeed some evidence that the new model may not be good law or sound public policy. While few countries have made the same shift as Canada, Australia has experimented with a two-step immigration selection model. Although in the Australian case skilled migrants are selected primarily from the foreign student stream as opposed to the foreign worker population, there is still a useful parallel. There is growing concern in Australia that the new two-step model has not led to better outcomes for immigrants. Lesleyanne Hawthorne has noted that immigrants to Australia who were previously foreign students experience lower salaries, less job satisfaction and a lower chance of using their education in their work, despite having higher overall employment rates.

This is not to say that the human capital model itself was without its flaws. Indeed, much has been written on the failure of Canadian employers to recognize foreign credentials, resulting in poorer economic outcomes and weaker employment prospects for foreign-trained workers than for Canadians with equivalent domestic credentials.

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229 Bellissimo, supra note 202 at 1.
231 Ibid. at 41.
4.7 Lack of Democratic Legitimacy

Regardless of the technical merits of the new model, the way in which it has been introduced, in the absence of debate or public consensus, may already be associated with a decline in support for immigration in general, as well as a risking a loss of respect for the lawmaking process itself among both immigrants and established Canadians. This loss of democratic legitimacy can undermine respect for government and for all areas of law, well beyond immigration law. When decisions are made seemingly arbitrarily (for example the retroactive elimination of the skilled worker backlog by way of Ministerial Instructions), immigrants and other Canadians may perceive that law in general can be made arbitrarily. This may have serious consequences for the way Canadians interact with their governments and each other. However, the psychological and social consequences of such a loss of legitimacy are far beyond the scope of this paper and will be the purview of sociologists and others.

I have already alluded to several factors that suggest a democratic deficit in the lawmaking processing around skilled worker selection, including the use of omnibus legislation, Ministerial Instructions, retroactive application of selection rules and more. Taken together, these measures have largely removed lawmaking in this area from Parliamentary and public debate and placed it firmly in the hands of the Minister alone. Any gains in flexibility in the system are more than offset by the loss of democratic legitimacy which may be felt across the legal system.

To quote again from Mario Bellissimo, “the pace, consistency and most importantly the mode of many of the changes raises serious legal and practical questions as to the prioritization of administrative efficiency and the impact on the democratic and nation building process.” He points to the fact that IRPA s.87.3(2), while it has so far primarily been used for setting caps and occupation lists, could be used for much broader and potentially more troubling purposes, with the only limitation that “[t]he processing of applications and requests is to be conducted in a manner that, in the opinion of the Minister, will best support the attainment of the immigration goals”.

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233 For example, “More Canadians are Questioning the Benefits of Immigration”, online: Angus Reid <http://www.angus-reid.com/polls/39498/more_canadians_are_questioning_the_benefits_of_immigration>.
234 Bellissimo, supra note 202 at 1.
goals established by the Government of Canada. In other words, the Minister decides what the goals are, and then evaluates his own Ministerial Instructions based on whether they achieve his own goals, with no opportunity for legislative or judicial oversight.

\[\text{IRPA, supra note 87, s.87.3(2).}\]
Conclusion

The past dozen years have witnessed the most significant changes in Canadian immigration law and policy since the 1960s. While there have been important developments in various aspects of immigration law, the most profound of these have been in the area of skilled permanent resident selection. These changes have amounted to a fundamental philosophical change in the way Canada chooses the majority of its immigrants, with corresponding impacts on many facets of Canadian law and even society in general.

Canada’s pioneering implementation of the human capital model of skilled immigrant selection, based on an objective assessment of long-term adaptability, came about as the result of a frank and inclusive debate, both in Parliament and in society in general, about the objectives and philosophy of immigration. This model served Canada well for decades, enjoying widespread support in Canada; it has also been emulated by numerous other countries around the world based on decades of seeing it in practice.

The new millennium has seen a wholesale abandonment of the human capital model in favour of an employment model where employers have the most important role in selecting skilled immigrants, with post-secondary educational institutions also playing a growing role. This transformation has not arisen out of a single legislative project, but has come about as the result of dozens of smaller changes. Many of these changes have been implemented without the need for new legislation, and thus have occurred with minimal consultation or debate. The most important legislative changes of the past decade have in fact been those that have further removed immigration lawmaking from the legislative process, resulting in a fluid, quickly-changing, poorly debated and poorly understood system of skilled immigrant selection.

In fact, most Canadians would probably be surprised even to learn that this transformation has happened. Indeed, many observers who have commented on aspects of the changes have failed to grasp just how significant this transformation is.
We do not yet understand all of the implications of this “sea change”\textsuperscript{236} in immigration policy. For example, we do not yet have data to support better long-term outcomes for employer-selected immigrants and their families, although some studies have shown better short-term economic outcomes. We have not adjusted our settlement funding model to account for the new two-step immigration system. We are just now starting to study the distortions on the labour market and other problematic policy implications of having a huge temporary foreign worker population in Canada with limited legal rights.

Most importantly, though, for more than a generation we have not had the right conversations about what Canada’s objectives should be in selecting skilled immigrants. The Federal Government has changed the immigration paradigm almost by subterfuge. The significance of the transformation, combined with our limited understanding of its implications, demands that Canadians engage in a once-a-generation national conversation about immigration and how it should serve the country’s collective future.

\textbf{A Note on the new Consultation Process – June 2013}

There are two substantial footnotes to this paper. First, on 15 July 2013, Minister Jason Kenney was moved in a cabinet shuffle out of the Citizenship, Immigration and Multiculturalism portfolio to be replaced by Chris Alexander, a much less experienced cabinet minister. Given that so many of the changes of the past decade have been directly initiated and promoted by Minister Kenney, it remains to be seen if the new minister follows the same path of law and policy reform and using the same lawmaking tools, and at the same bewildering pace as his predecessor. While Minister Alexander has a background in international relations, his experience on the immigration file is much more limited and it is possible that his experience as a diplomat in conflict zones may influence his approach to immigration.

The second footnote is that on 21 June 2013, CIC announced the launch of a national consultation process soliciting feedback on immigration levels, the mix of categories, the selection system for skilled immigrants and many other aspects of the immigration system.

\textsuperscript{236} Alboim and Cohl, supra note 160 at 9.
including the degree of flexibility appropriate to the system. In addition to an online multiple-choice questionnaire (with a small number of open-ended questions) open to all individuals and organizations in Canada and abroad, an in-person consultation process led by the Parliamentary Secretary for Immigration is being conducted across Canada with invited organizations:

Invited stakeholders represent a variety of perspectives, including those of employers, labour, academia, learning institutions, professional organizations, business organizations, regulatory bodies, municipalities, Aboriginal groups, settlement provider organizations and ethnocultural organizations.

CIC also produced an extensive backgrounder to help frame the discussions. The backgrounder includes preliminary immigration numbers for 2012 and outlines the key challenges for the Department. This type of information, and the way in which it is presented, is helpful in informing the debate for the public and stakeholders.

However, there are serious deficiencies in the new process. Most of the questions asked appear structured to elicit certain types of responses, which will of course colour any data that arise from the process. In person consultations are only with preselected groups whose input the government has chosen to prioritize. More seriously, these consultations are coming at the end of a decade of dramatic change that has already happened, and not as a genuine process of soliciting public and expert opinions before embarking on major changes in the law. One wonders if the government would be prepared to change course in a meaningful way as a result of these consultations in this context.

On its surface, this appears to be much the type of consultation that deserves to take place and is long overdue in the context of the transformation the immigration system has been undergoing.

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239 News Release on Consultations, supra note 237.
However, given that the limited consultations of the past decade have failed to spark the type of comprehensive national discussion on immigration that was seen in the 1960s and 1970s and which is sorely needed again, it has yet to be seen whether this round of consultations will also disappear into the dustbin of Canadian immigration legal history.