

Canada's New Economic Immigration System: Express Entry Whose Interests Are Being Expressed?

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Introduction¹

One year ago, on 12 December 2013, Bill C-4, *A Second Act to implement certain provisions of the budget tabled in Parliament on March 21, 2013 and other measures* received Royal Assent. This Bill contained key amendments to the Canadian immigration scheme that will introduce the new Expression of Interest / Express Entry (EE) System. In my testimony last year before the Senate Committee on Foreign Affairs on behalf of the Canadian Bar Association, I referred to the new EE System as a “game changer that carries with it exciting possibilities”.² Now just a few weeks away from purported implementation, many questions remain outstanding as we await full rollout by Citizenship and Immigration Canada (CIC). EE systems have been in use in New Zealand since 2003 and Australia since 2012, so I will look to these systems in brief for cues and clues of what we may expect. I will also set out questions and concerns and look at the future role of lawyers working within the new system while ultimately attempting to address a key question of whose interests will be best expressed and satisfied in this new system.

There is great interest in EE as to its scope, potential and how it may change the world of Canadian immigration. This piece reviews some of the nuts and bolts of the new system and focuses on jurisdictional questions, privacy concerns and potential future trends. To begin, I will turn to a brief summary of the legislation tabled last year and the Ministerial Instructions (MI) just released this month that work in tandem to provide the legal basis for EE.

What is Express Entry (EE)?

The EE system is a three stage active immigration process whereby interested applicants will first submit an EE form online. Second, CIC then assesses these potential applicants against specific eligibility criteria. Potential applicants who are deemed to have met the eligibility criteria are entered into a pool of candidates. Third, those candidates whose profiles and attributes align with the identified needs of the government, as well as, it seems, of certain Canadian employers, will be issued an “invitation to apply” (ITA). Only those candidates who receive invitations can then proceed to apply for permanent residence.

(a) Amendments to the *Immigration and Refugee Protection Act (IRPA)*³

The following amendments under Part 1 of the *IRPA* that would establish an EE system include:

Division 0.1 – Invitation to Make an Application

1. The EE would be reserved for Economic Classes only [**s. 10.1(2)**]

¹ Portions of this paper were included in a paper entitled *Law-Making Innovation in the Canadian and International Immigration Context: International Comparisons and Cautions for Canadians*, Mario D. Bellissimo, *Canadian Bar Association Professional Development Conference, Montreal, 2013 and The Federal Skilled Worker Program: Reset, Reshaped and Reintroduced Law Making & Litigation Implications*, LSUC 21st Annual Immigration Law Summit, Osgoode Hall, 130 Queen Street West, Toronto, *Mario D. Bellissimo, LL.B., C.S. and Sindura Dar, LL.B.*

² I appeared before the Senate Committee on Foreign Affairs in my previous role as Chair of the National Immigration Law Section of the Canadian Bar Association on November 21st, 2013 regarding proposed changes to the *Immigration and Refugee Protection Act (IRPA)* in Part 3, Division 16 of Bill C-4, Economic Action Plan 2013 Act No. 2.

³ Bill C-4, Economic Action Plan 2013 Act No. 2, Division 16, s. 290. For a copy of the Bill, see: <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=6263082>.

2. Submission of an EE would be electronic [s. 10.1(3)]
3. Foreign national is not eligible if inadmissible for misrepresentation [s. 10.1(4), s. 11.2]
4. A foreign national cannot have more than one EE in the system at a time [s. 10.1(5)]
5. The Minister can give instructions governing any matter within the EE system, including: [s. 10.3(1)]⁴
 - a. Classes eligible to participate;
 - b. The electronic system;
 - c. Submission and processing of EE by electronic system;
 - d. When an EE may be submitted by a means other than the electronic system;
 - e. The eligibility criteria to receive an ITA;
 - f. Eligibility period to be invited to make an application;
 - g. The personal information the Minister may disclose to facilitate the selection process, and to which entities;
 - h. The basis on which eligible foreign nationals will be ranked;
 - i. The rank an eligible foreign national must occupy to receive an ITA;
 - j. The number of invitations that may be issued within a specified period (including the possibility that instruction may provide that the number of invitations that may be issued in any specified period in respect of a class be zero);
 - k. The time period within which an application must be made upon issuance of an ITA: and
 - l. How a foreign national is advised of matters with respect to their EE, including an ITA.

On December 1, 2014, pursuant to s. 87.3 of *IRPA*, the Minister issued new MIs valid as of January 1, 2015. These Instructions repealed the MI published on April 26, 2014⁵ and set out some of the specifics of EE for the management and processing of economic class applications in the following economic immigration programs:

- Federal Skilled Worker Program – as defined in s. 75(1) of *IRPR*;
- Federal Skilled Trades Program – as defined in s. 87.2(2) of *IRPR*;
- Canadian Experience Class – as defined in s. 87.1(1) of *IRPR* and
- Provincial Nominee Program – as defined in s. 87(2) of *IRPR* – partially

We have also been given further information on how the program will function.

(b) Online Express Entry Profile Registration

Potential candidates are required to complete an online EE profile outlining:

- skills
- work experience
- language ability
- education and
- other details that will help in assessing eligibility

⁴ <http://laws-lois.justice.gc.ca/eng/acts/i-2.5/nifnev.html> - Amendments not in force

⁵ <http://www.gazette.gc.ca/rp-pr/p1/2014/2014-04-26/html/notice-avis-eng.php> - Ministerial Instructions in Canada Gazette April 26, 2014

Those who meet the criteria of one of the federal immigration programs listed above will be accepted into a pool of candidates. It is important to distinguish between applying to enter the pool which is wide open to start and being selected into the pool. The electronic entry into the EE pool does not guarantee that an applicant will be issued an ITA for permanent residence. Invited candidates will then still have to meet eligibility and admissibility requirements under the IRPA.

(c) Comprehensive Ranking System

The applicants who registered online will be ranked one against the other based on the “Comprehensive Ranking System” (CRS) on the factors mentioned above. Applicants that have a job offer or have a provincial nomination will receive additional points. All applicants in the EE pool will be granted points (maximum of 1200) that take into consideration the following factors:

- Skills and work experience (up to 500 points)
- Spouse or common-law partner factors (such as their language skills and education -up to 40 additional points but still a maximum of only 500 points)
- Skills transferability (including education and work experience that, when combined, result in better chances of being employed, and higher earnings – up to 100 points)
- Additional 600 points for those with a nomination from a province or territory or a valid job offer⁶

For a principal applicant the point allocations break down as:

Factors	Sub-factors	Maximum points No spouse/partner	Maximum points With spouse / partner	
1. Core human capital factors	Age	110	100	
	Education	150	140	
	Language	first	136	128
		Second	24	22
Canadian work experience	80	70		
Total		500	460 – up to 40 points for spouse 500	

A few points are important to highlight for the **core / human capital factors**. One, although an applicant can collect points for a spouse/partner, the additional points do not exceed what an applicant can score on his/her own:

Factors	Maximum points For spouse/ partner
Education	10
Language – first	20
Canadian work experience	10
Total	40

⁶ <http://www.cic.gc.ca/english/express-entry/grid-crs.asp>

Two, in calculating the points for the **age factor**, the maximum points allowable are for persons between 20 – 29 years old. Commencing at 30 years of age, the points granted decrease by 5 for each year, so that at 45 years old, one receives 0 points. Three, for the **education factor** – PhD / Master Credentials are awarded a higher score, as are the entry-to-practice professional credential (NOC level A that require licensing by provincial regulatory bodies, like pharmacists, professional engineers, medical doctors, CPA, etc.). Four, there are no additional points awarded for family members in Canada. Five, the definition of Canadian work experience and full-time employment remain the same.

A maximum of 100 points is available for the combination of transferable skill factors that include varied combinations of level of education, foreign work experience, Canadian work experience, official language proficiency and certificates of qualification. These factors are set out at sections 20 through 28 of the Ministerial instructions. Thus, the core human capital factors plus the transferable skills factors amount to a maximum of **600 points in total**. If a job offer is available or a provincial nominee certificate – then an applicant will receive an additional 600 points, to a maximum of 1200.

(d)The Need for Labour Market Impact Assessment Applications (LMIA)

Any candidate without a job offer supported by a Labour Market Impact Assessment (LMIA), or a nomination from a province or territory, must register with Employment and Social Development Canada's (ESDC) Job Bank. Applicants are required / encouraged to promote themselves on the Job Bank as well as in any other way, i.e. recruiters, job boards, etc. Job Bank advertising will help connect EE applicants with eligible employers in Canada. The LMIA process is no different under the EE regime as the focus remains upon ensuring employers made efforts to hire Canadians for the available positions. One distinction is that there will be no LMIA fee for permanent resident applications. An applicant must meet the requirements of section 5 (conjunctive) of the MI to qualify for an ITA:

*5. (1) In order to be eligible to be issued an invitation, a foreign national must
(a) meet the requirements to be a member of at least one of the classes referred to in paragraphs 2(a) to (c);*

*(b) meet the requirements of
(i) sub-paragraph 82(2)(c)(ii) of the Regulations, if they are a foreign national referred to in paragraph 82(2)(b); or*

(ii) clause 87.2(3)(d)(iv)(B) of the Regulations, if they are a foreign national referred to in subparagraph 87.2(3)(d)(iii); and

(c) not later than 30 days after the day on which they submit their expression of interest, register with the Job Bank of the Department of Employment and Social Development, if they do not have a qualifying offer of arranged employment or are not named in a nomination certificate issued by the government of a province referred to in paragraph 2(d) under its provincial nominee program express entry stream at the end of that period.

Sections 5(a) and 5(c) respectively, set out that applicants must qualify under one of the three programs (FSW, FST and CEC) and register with the Job Bank as set out above within 30 days of completing the online EE profile application, if without a job offer or a provincial nomination. Under the current legislation, section 82(2)(b) of *IRPR* allows applicants to claim points for

arranged employment / job offers, though a work permit obtained under an LMIA exception including section 204(a) (international agreements, i.e. NAFTA) or s. 205(a) (significant benefit) or s. 205(c)(ii) (public policy i.e. professionals) of *IRPR*. To qualify for the 600 point bonus these foreign workers, although in possession of a work permit, must obtain a positive LMIA. As a further point, they cannot receive an ITA through the Federal Skilled Worker program unless they have an LMIA or more than one year of work experience.

This is a condition that will likely raise concerns as to the legal and practical basis for this additional requirement. Without knowing but speculating I assume CIC's position will be that the LMIA exempt work permits are for a temporary purpose but when those same foreign nationals wish to seek permanent residence through EE, CIC must ensure that the Canadian workforce is protected and the need tested through a LMIA. It will be interesting to see how this plays out for LMIA exempt work permit holders that do have permanent resident aspirations. This process does seem to imply that ESDC will need to undertake some alternative form of assessing the labour market impact (given the de facto legal recognition that these foreign nationals did not require an LMIA for a temporary purpose) for permanent residency. Will we see a permanent residency LMIA stream in the future? Dual intent LMIA's exist now but will we eventually see a further emphasis on long term residency considerations? In any event this will likely mean a significant increase in LMIA applications. Will ESDC be properly resourced? The Q&A issued by CIC notes:⁷

52. What funding is in place to support the implementation of Express Entry?

Economic Action Plan 2014 committed \$14 million over two years and \$4.7 million ongoing to implement the Express Entry system.

Additionally, Employment and Social Development Canada (ESDC) received funding for two key components for employer participation in the Express Entry system:

- **Job Match/Job Bank will receive \$11.8 million over 2 years and \$3.3 million ongoing to enhance the job match service; and**
- **The Labour Market Opinion (LMO) (now Labour Market Impact Assessment (LMIA)) process also received funding of \$11 million over 2 years and \$3.5 million ongoing to enhance and strengthen the LMO process, including improved processing times for certain applications.**

So it does appear CIC has placed emphasis on the role of LMIA's in the new EE system in advance of roll out.

Express Entry Draws & ITA

After ranking CIC will organize "draws" and invite selected candidates to submit a full, complete application for permanent residency (ITA). The draws will be made randomly based upon inventory. Before a "draw", CIC will post instructions on their website and include:

⁷<http://www.cic.gc.ca/english/department/media/notices/2014-12-01.asp#52>, page 21

- date and time of the draw,
- number of candidates that will get an ITA, and
- if it applies, which specific immigration program(s) will be included in the draw.

It is anticipated the first draw will occur towards the end of January 2015. At present, there is no intention to limit intake with occupational lists or caps. There is also no set number at this time to qualify for an ITA. This could open the program up to frivolous applications being filed, overload, spamming, computer hackers as well as start up technical issues. It would be interesting to know what steps CIC has taken to protect the system.

Once issued an ITA, applicants will have 60 days to submit an online application for permanent residence with exceptions only for persons with disabilities with a stated 6 month processing goal after receipt. Applications will be held in the pool for twelve months.

Queries

(a) Inventory Management Tool

Despite the release of the MI there remain many questions at the time of writing this piece. I will attempt to highlight a few with a focus on jurisdictional questions and privacy concerns. The key question is the legal scope of the EE program. Is it an inventory management tool or will it redefine the economic classes under the *IRPA*? Mr. David Manicom (Acting Associate Assistant Deputy Minister, Strategic and Program Policy, Department of Citizenship and Immigration) testified before Committee as follows:

First, to clarify, it's not a new immigration program, it's a new application management system that we'll be launching to ensure that our immigration system is fast, flexible, and gives Canada the opportunity to select the best skilled immigrants and respond quickly to labour force needs.

It will allow the government, the provinces and territories, and employers to actively target highly skilled immigrants for permanent residency. Under the system, candidates will first make an online submission to express their interest in coming to Canada and provide basic information about their skills and work experience. Those who meet the basic eligibility criteria of one of the federal economic programs that are part of express entry will then be ranked according to their human capital and other key characteristics. They will receive significant supplementary points if they have an approved job offer through the labour market assessment process or are nominated by a province. We will then give invitations to apply on a regular basis, each two weeks, to the right number of applicants who are most highly ranked and invite them to make an application to apply for permanent residence. This way we will be taking the best people out of the pool each time and not accumulating new inventories. When they receive their formal applications they will be processed within six months.

The answer appears clear and the messaging from CIC has been consistent that this program is an application management system. In my estimation why the question persists as to the scope

of the program, is because of the very broad powers conferred on the Minister. Specifically, as outlined above in section 10.3 the Minister can determine which classes will issue invitations based on an EE system, and how many invitations per class will be issued. The Minister can even set this number to zero, which may have the effect of suspending that particular class (or multiple classes) as a whole. But key provisions that amend the *IRPA* effective January 1st, 2015 provide jurisdiction going beyond inventory management to potential new program requirements and undefined information sharing with a potential for a five year ban.⁸ Specifically:

- **Section 290 of the Bill [section 10.3(1)]** affords the minister 12 additional powers not including the least of which is the authority to define classes and criteria eligible for participation.
- **Section 10.3 (5)** - The Minister can by instruction provide for criteria that is more stringent than current criteria or requirements under any other division of the *Act* –This is a very interesting provision that allows the Minister to alter requirements for purposes of EE. This section could be deemed *ultra vires* if by MI other sections of the *IRPA* are redefined without amendment. It is also curious despite the instructions being restricted to economic classes (**s. 10.1 (2)**) this provision allows the Minister to establish stricter criteria for any division of the Act. A key question is whether a change to other requirements in the *IRPA* will be deemed lawfully permissible if restricted to the management of the EE system?

How could this play out in practical terms? An interesting example may be ineligible employers referred to in section 209.91(3) of the Regulations and highlighted under the definitional section of “qualifying offer of arranged employment” under section 1 of the MI. A blacklisted employer cannot support an offer for an EE LMIA. Section 10.3(5) could impose more stringent criteria on blacklisting an employer than the regulatory scheme under section 209.91(3) - in effect, amendment by instruction.

It is also important to note from Mr. Manicom’s testimony the three sources identified for potential permanent residency selection including (1) the government, (2) the provinces and territories, and (3) employers. In the new system all three sources are anticipated to actively target highly skilled immigrants for permanent residency. This is important and I will return to this point when discussing potential future trends.

(b) Privacy Concerns

- **Section 10.4** - disclose private information to undefined “entities” – what entities and why are they undefined? Could one entity be the Canada Border Services Agency (CBSA) for purposes of enforcement? What about Revenue Canada? ESDC? If so, information sharing through EE could raise unexpected issues for foreign nationals and representatives.

In terms of the privacy concerns given the system brings prospective employers and CIC into an “information sharing relationship” prior to the filing or processing of any application, how will

⁸Section 292 91. (5) - the Minister can designate a body - the authority to represent or advise a person for consideration in connection with submissions of an EE. It is assumed this refers to the Immigration Consultants of Canada Regulatory Council but given the introduction of the new Employer Liaison Network it is worth noting the language remains broad enough to accommodate other bodies.

this work? How much information regarding an applicant can be shared with an employer? How will certain employers be deemed eligible to have access to a pool of qualified candidates?

At section 7(2) of the MI, the Minister “may disclose to officials responsible for the administration of the provincial nominee program” the personal information of applicants. This is quite broad and includes for example a curious reference that information will be shared with the provincial authorities regarding a foreign national meeting the “minimum necessary income”?⁹ Can we gain any cues and clues from the experiences of our international counterparts?

I. International Cues & Clues

New Zealand

So given the questions and concerns enumerated above, and the fact that the idea for an EE system in Canada was largely derived from New Zealand’s (NZ) Expression of Interest (EOI) model as well as from Australia, a quick review of their systems may afford us some cues and clues moving forward. The NZ system is a two stage process. In form INZ 1101 *Skilled Migrant Category, Expression of Interest Guide* it reads:

The Prerequisites

To be considered under this category you need to be of good health, good character, have a reasonable standard of English and be under 56 years of age. You will also need to meet the threshold of 100 points for employability and capacity-building factors to have an Expression of Interest (EOI) accepted.

The Points System

The points system is designed to reflect which applicants have the most to offer New Zealand so that Immigration New Zealand (INZ) can extend invitations to apply for residence to them. The points you can qualify for are set out on page 6. Points are available for skilled employment in New Zealand, work experience, qualifications, age and close family in New Zealand. Bonus points are available for employment in identified areas of future growth and/or absolute skill shortage. Bonus points are also available for employment outside Auckland, studying full-time in New Zealand for at least two years towards a recognised New Zealand qualification, gaining recognised New Zealand qualification(s), and for a partner’s recognised qualification or offer of employment.

Applicants can make an online EOI application at a cost of roughly \$480.00 Canadian and \$610.00 Canadian for a paper based EOI application. If an Applicant has an EOI score of 100 points or more, it goes in the pool of EOIs. Every two weeks Immigration authorities automatically select EOIs with a points score of 140 or over from the pool. Then they select EOIs with a points score between 100 and 139 which include points for a skilled job or job offer. If spaces remain available, they use additional criteria to select lower scoring EOIs. EOIs are only

⁹ Ministerial Instructions Respecting the Express Entry System, November 28, 2014, section 7(2) (n)

valid for six months and the EOI fee will not be refunded. The point breakdown in part is as follows:¹⁰

Claiming points on your Expression of Interest (EOI)

If you meet the minimum standards, you will want to know how many points you can claim on your EOI. You'll need at least 100 points to go into the 'pool' that we select EOIs from every two weeks.

- **Skilled employment:** You can claim 50-60 points for a job or a job offer in New Zealand that requires specialist, technical, or management expertise. You can get bonus points, for example if the job/job offer is in certain industries, or if your partner also has a skilled job/job offer.
- **Work experience:** You can claim points for at least two years' work experience in the same field in which you have skilled employment. An example is if your experience is in New Zealand, or in certain industries.
- **Recognised qualification:** We award 40-60 points for a variety of trade certificates, diplomas, bachelor's degrees and post-graduate qualifications. You can get bonus points for qualifications, too.
- **Age:** We award a minimum of 5 and a maximum of 30 points for age. You must be under 55 years old to apply.
- **Close family:** You can claim 10 points if you have close family with New Zealand residence or citizenship.

Application Form

The NZ EOI application comprises thirty-six pages. The EOI application form is an interesting read with a number of notable inclusions worthy of comment. First, Section A **Identity** A20 asks if the applicant has received immigration advice on the EOI application. Section B **Character**, BI asks an applicant if they have been sentenced to a term of imprisonment for five years or more regardless of any suspended sentences or any expunged criminal records. B7 includes specific questions about drug trading and trafficking. Section C **Health** specifically asks about dialysis treatment and haemophilia. Section D **English Language Ability** allows an applicant to meet language thresholds with IELTS but also by having a bachelor degree or a higher qualification conducted entirely in English, or current skilled employment in New Zealand for 12 months or more amongst others.

Certain questions are not to be answered by yes/no. In particular, under Section E **Skilled Employment in New Zealand**, applicants are asked to give a detailed reason in support of claims for point allocations (E1-E9). I am doubtful we will see a question like this on Canada's EE profile because it would infuse an element of discretion into the selection process. However, I am not a techie so I do not know if an algorithm, if that is the route Canada like Australia ultimately goes, can assess this type of information.

Pursuant to section F **Recognized Qualifications** applicants are asked if one's qualification has been assessed by the New Zealand Qualifications Authority (NZQA), the government agency

¹⁰www.immigration.govt.nz/migrant/stream/work/skilledmigrant/caniapply

responsible for quality assurance of qualifications. The applicant must provide an NZQA assessment of qualification unless one of the following applies:¹¹

- ***your qualification is on our List of Qualifications Exempt from Assessment, or***
- ***your qualification is on our List of Qualifications Recognised as an Exception or***
- ***you have full or provisional registration and your qualification has been assessed by a New Zealand organisation as being comparable to a New Zealand qualification on the List of Qualifications Exempt from Assessment***

Interestingly, there are a number of exempt educational qualifications and institutions categorized by country including Canada. For Canadian applicants many of the qualification exemptions include Bachelor Degrees, Doctorates, and Masters from various Canadian universities.¹² Section N, **Other Family** at N2 explicitly recognizes that the presence of close family members enhances long-term prospects for employability and settlement. Close family members under New Zealand immigration law include adult siblings, adult children and/or parents. An important section for immigration lawyers is Section Q **Immigration Advisor's Details** which sets out the exemptions under the *New Zealand Immigration Adviser's Licensing Act, 2007*, while Section R **Declaration by Person Assisting the Applicant** asks a series of questions to confirm the nature of the service provided to the applicant. An important clarification regarding the information collected in the EOI application form reads:

The information about you and your family in this form is being collected to determine whether we will invite you to apply for residence in New Zealand and may also be used to contact you for research or marketing purposes or to advise you on immigration matters. This information may also be used to determine your entitlement to board a flight to come to or return to New Zealand. Your personal information will not be shared with airline check in agents, however a boarding message will be returned to the airline check in agent based on information you have supplied on this form.

The main recipient of the information is Immigration New Zealand (INZ), a service of the Ministry of Business, Innovation and Employment, but it may also be shared with other Government agencies that are entitled to this information under applicable legislation. In particular, the Ministry of Social Development (Work and Income) may be given information about your personal resources. The collection of the information is authorised by the Immigration Act 2009 and the Immigration Regulations made under that Act. The supply of the information is voluntary, but if you do not supply the mandatory information required by the Expression of Interest form, then your Expression of Interest cannot be accepted.

If selected, an 'Invitation to Apply' for residence under the Skilled Migrant Category is sent. Applicants must provide evidence to support the points claimed and proof that all dependents

¹¹ <http://www.dol.govt.nz/immigration/knowledgebase/item/1199>

¹² <http://www.immigration.govt.nz/opsmanual/47085.html>

meet all health, character and English language requirements including the form and fee.¹³ Fees are based on geographic region. By way of example, Canadian applicants are required to pay a permanent resident fee totaling approximately \$2250.00 CDN. Applications must be submitted within four months of being invited to apply for residence. Any applications received after four months will not be accepted. If filed within time there exist three possible outcomes:

- Approval and grant of residence.
- Deferral of application and a granting of a Skilled Migrant Category job search visa. This is a temporary visa that will allow the applicant to enter NZ to search for skilled employment. It will be valid for a stay of nine months and is an open work visa.
- Refusal of application.

Australia

As noted above, in July 2012 Australia introduced an EOI two step system similar in some respects to the NZ EOI immigration system reviewed above.¹⁴ SkillSelect is the name of the Australian online service that enables skilled workers and business people to file a skilled visa application through an EOI. Intending migrants can then be found and nominated for skilled visas by Australian employers or state and territory governments, or they may be invited by the Australian Government to lodge a visa application. All EOIs must be completed online using SkillSelect. There is no fee to submit an EOI in SkillSelect and at the conclusion of the online process a points score will be provided. The result and points score generated after applying for an EOI, along with the time and date of filing becomes the applicants ranking for some visas. Rankings are processed automatically by SkillSelect with no involvement of the department's staff. The EOI system extends to points based on temporary and permanent migration, business investment and innovation visa programs. Any false information on EOI applications results in three year bans. A range of information in the EOI application form is required depending on the visa, such as:

- Basic personal information
- Nominated occupation
- Work experience
- Study and education
- Level of English skills
- Details of a Skills Assessment, related to the nominated occupation
- Business and investment experience.

Applicants are ranked according to the appropriate points test. Applicants are able to submit an EOI even if they do not meet the pass mark; however, they will not be invited to apply for a visa. Point calculations are specific to the visa class. Nominated occupations or priority occupations are on the Skilled Occupation Lists. Like the NZ model, the applicant must provide details of a Skills Assessment relating to the nominated occupation. While applicants are not required to submit documents supporting point claims they must still provide certain information like a completed skills assessment referred to above and/or a job ready program, and have taken an English-language test as proof the English language requirement has been met. Once completed the EOI is stored in SkillSelect and is valid for two years. If an applicant

¹³ <http://www.immigration.govt.nz/NR/rdonlyres/00B58004-04AB-46C6-B32B-5CE91FBA979A/0/INZ1028.pdf>

¹⁴ <http://www.immi.gov.au/skilled/general-skilled-migration/skilled-occupations/skills-assessed.htm>

does not complete the EOI it will be stored for two years, but the applicant will not be eligible to receive an invitation. It is the applicant's responsibility to access the EOI and update the details if circumstances change. An EOI is not considered a visa application and applicants will not be granted a Bridging visa or be able to appeal any decision on EOI applications.

Caps or what the Australians refer to as an occupation ceiling may be applied to invitations issued under the points based skilled migration program. This ensures that the skilled migration program is not dominated by a small number of occupations. When this limit is reached, no further invitations for that particular occupation group will be issued for that program year. Invitations would then be issued to other EOIs who have nominated available occupations even if they are lower ranking. For the state and territory nominated visas, a state or territory will not be able to nominate an applicant if the nominated occupation has reached its occupation ceiling.

So invitations will be issued automatically to people with the highest ranking EOIs, subject to occupation ceilings and to those whose point score exceeds the current pass mark, although not all EOIs that meet the point test pass mark will receive an invitation. State or territory governments will locate and select skilled business people that they want to nominate. State and territory governments may assess people before they nominate. On a limited basis, nominating state or territory governments may award additional points towards the innovation points' test where they have determined that the proposed business is of exceptional economic benefit to that state or territory.

The Skilled Occupation List (SOL) is available to applicants in various streams including: independent points-based skilled migration where applicants are not nominated by a state or territory government agency, a Family Sponsored Points Tested visa and a Temporary Graduate visa (subclass 485) - Graduate Work stream. The consolidated Sponsored Occupation List (CSOL) applies to points-based skilled migration where applicants are nominated by a state or territory government agency under a State Migration Plan, the Employer Nomination Scheme (ENS), where applicants must have been nominated by an Australian employer to fill a position in an occupation that appears in the CSOL, the Temporary Work (Skilled) visa (subclass 457) and the Training and Research visa (subclass 402). Most recently, based on feedback received as part of an evaluation, the following changes are in place as of 1 March 2014:¹⁵

- ***State and territory nominated visas will no longer be subject to occupational ceiling limitations***
- ***The minimum ceiling for each occupational group will be 1000 invitations.***
- ***As there are still high levels of interest from prospective skilled migrants in the following six occupations, pro rata arrangements for these occupational groups will continue:***

- 1. Chemical and Materials Engineers***
- 2. Electronics Engineers***
- 3. Other Engineering Professionals***
- 4. ICT Business and Systems Analysts***
- 5. Software and Applications Programmers***
- 6. Telecommunications Engineering Professionals.***

¹⁵ <http://www.immi.gov.au/skills/skillsselect/>

- ***Details of the cut-offs for these occupations will continue to be included in the regular invitation round reports.***

So would these programs work in Canada?

Although there are distinctions looking at certain features of the NZ and Australian systems respectively, both programs from which Canada has already borrowed heavily may inform our discussion and raise a number of key considerations. An interesting feature is noted in a research brief by the *Alberta Association of Immigrant Servicing Agencies* released in December 2013:¹⁶

There are key differences between the model in New Zealand's application and how Canada's model will be implemented, making direct comparison between the two countries problematic, which will be discussed in this article.

A key reason why comparison between countries is challenging with regards to this immigration model is that most of the applicants are people who are already "on shore" that Canada terms Temporary Foreign Workers (TFWs). Canada has not stated that TFWs will easily be able to apply for this immigration stream.

New Zealand's current success in integrating immigrants who already live in the country diverges from the information provided by the Canadian government thus far, which appears to focus on processing applications while applicants are overseas.

The research brief goes on to note that 87% of applicants approved within the NZ EOI program are onshore while only 13% are off shore.¹⁷ Onshore landings include applicants in possession of temporary migrant visas. This number has since climbed to about 89%.¹⁸

In Australia, the 2013-2014 Migration Programme Report¹⁹ lists the total number of landings at 190,000, 126,550 or 68% of which were in the economic class. Over 50% of those landings were the result of Regional, State, or Territorial visas (similar in certain respects to the Canadian provincial nominee programs) and the Employer Nomination Scheme (ENS). In total, on shore landings climbed to over 50% and in the ENS subclass 83.6% were on shore landings.

Canada by comparison in the Report on Plans and Priorities 2014-2015²⁰ notes a target of 261,000 landings, 164,500 of which or 63% are to be in the economic class. My estimation that the on shore or in land permanent resident visas issues would likely not exceed 30%. So it stands to reason given the focus on LMIA's in the EE rollout, its reliance on the Australian and New Zealand models and the noted streams for active recruitment the federal government, provinces and employers like the Australian program the focus will be - on shore landings. So

¹⁶ <http://aaisa.ca/wp-content/uploads/2013/02/EOI-BRIEF-DRAFT.pdf>, page 1

¹⁷ <http://aaisa.ca/wp-content/uploads/2013/02/EOI-BRIEF-DRAFT.pdf>, page 3

¹⁸ [http://www.immigration.govt.nz/migrant/stream/work/skilledmigrant/overview/;](http://www.immigration.govt.nz/migrant/stream/work/skilledmigrant/overview/)
[http://www.immigration.govt.nz/migrant/stream/work/skilledmigrant/caniapply/points/default.htm;](http://www.immigration.govt.nz/migrant/stream/work/skilledmigrant/caniapply/points/default.htm)
<http://www.immigration.govt.nz/migrant/stream/work/skilledmigrant/caniapply/qualifications/default.htm>

¹⁹ <http://www.immi.gov.au/media/statistics/pdf/report-migration-programme-2013-14.pdf>

²⁰ www.cic.gc.ca/english/resources/publications/rpp/2014-2015

the question to ask is this the long term vision of the Canadian EE program? Other key points as to future trending include:

1. **Multiple Point Systems and Visas:** In the NZ model we note certain occupations are more heavily point weighted and the Australian model offers visa specific point allocations and varied visas (graduate, research and training, Family Sponsored Points Tested visas etc). I hoped to see Canada move away from a “one size fits all” point system and cater to more nuanced needs, and by extension, to varied visas. The NZ program allows for a nine month open Skilled Migrant Category job search visa for applicants to enter the domestic work force to secure employment. This visa must in part contribute to a high number of onshore applicants in NZ. It is a creative option that affords skilled workers a probationary period to integrate. These types of innovations do run the risk of complicating the system given varying point grids but also may result in a more flexible and responsive program overall. We may see a move to this type of system in the future.
2. **Minimum Work Experience:** In the NZ model, two years of work experience is a minimum requirement for eligibility – and I notice that work in Canada carries heavy weight in the new CRS– the more experience, the more points. A two year minimum which could be imposed by MI may be more stringent but could also result in stronger applications in CIC’s view. Again more emphasis on Canadian employment for longer periods (i.e. 2 years minimum) depending upon inventory could follow in Canada like its NZ counterpart.
3. **Streamlined Processing:** The NZ system asks upfront medical questions regarding certain medical conditions like dialysis treatment and haemophilia, and front line criminality questions regarding, for example, drug trafficking. Would these questions be deemed legally permissible in Canada?

Also, the NZ system, unlike the Australian model and the current Canadian requirements for IELTS, allows for reasonable exceptions such as having a bachelor degree or a higher qualification conducted entirely in English, or having current skilled employment in New Zealand for 12 months or more, amongst others. As highlighted above, the NZ and Australia EOI system also allows for a number of country specific educational qualification exemptions. Not so in Canada, unless somebody studied in Canada.

It also mandates a four month filing deadline once an applicant has been selected for an invitation. In Canada, CIC requests the applicant submit a complete application in 60 days (2 months).

So EE in Canada will still require significant back end processing and is more burdensome for applicants so revisiting streamlined processing options may be necessary to meet the needs of a 6 month just in time immigration system.

4. **Will Family Remain a Priority?:** The NZ model awards ten points to applicants who have close family in NZ, and Australia offers a Family Sponsored Points Tested visa, both being examples of a fusion of economic and family class processing. As noted, no points are being granted for having family members in Canada in the CRS. Both the NZ and Australian programs respectively, explicitly recognize that the presence of close family members enhances long-term prospects for employability and settlement. This in my opinion is an oversight in the CRS and should be remedied.

5. **Scope of EE Program:** As noted in Australia, state sponsored programs equivalent to Canada's PNP programs operate within the EOI system as do certain work visas. It is likely PNP programs and active recruitment by provinces will. Will other provinces programs become more like Quebec's program outside of EE? Potentially. As noted employers will play a more critical role likely through the newly created Employer Liaison Network (ELN). Pursuant to section 292 91. (5), the Minister can designate a body - the authority to represent or advise a person for consideration in connection with submissions of an EE. It is assumed this refers to the Immigration Consultants of Canada Regulatory Council (ICCRC) but given the introduction of the new ELN it is worth noting the language remains broad enough to accommodate other bodies. Either way the three streams of active recruitment federal, provincial and employer will likely define the scope of the new EE program.

Also, in NZ, there is a notable fee to make an EOI application while in Australia there are no fees, like Canada. Also, the NZ fee for permanent residency applications is in excess of \$2000.00 CDN. Will Canada increase fees? So far, there is no indication of a processing fee increase.

6. **Other Legal Considerations** Furthermore, will the information collected under the EE program be shared with other agencies? The MI provide the authority in Canada. Will specific questions be put to immigration lawyers regarding the scope of their representation, similar to the NZ EOI forms?
 - In Australia no appeal flows from a decision on an EOI. Canada seems to be following suit with respect to legal review. A CRS ranking, potentially by a computer algorithm, it will be argued is not a decision or an application under the Act. What will be reviewable will be a fascinating legal question that will evolve over the next few years. Nevertheless, provisions like s.10.3 (5) – whereby the Minister can, by instruction, provide for criteria that are more stringent than current criteria or requirements under any other division of the Act, may be challenged as *ultra vires* the legislation. The Courts will have to eventually squarely address the use of MI and its place in the legal hierarchy of the Act and the *Regulations*. The role of MI continues to expand and section 10.3(5) is in my view the most legally broad provision to date involving MI. A key question as stated is whether a change to other requirements in the IRPA will be deemed lawfully permissible if restricted to the management of the EE system?

Therefore, important insights regarding the jurisdictional scope of the program, privacy issues and potential future trends can be gleaned by looking at our international counterparts.

Role of Lawyers in the New System (Ethical & Professional Considerations)

Following our international cues and clues discussion and from what has already been revealed about the proposed Canadian EE system, it is safe to say that the role of immigration lawyers' pre-application filing responsibilities will expand in this new system. Issues regarding potential encroachment on the solicitor client confidential relationship, privacy concerns and strict timelines to respond to EE invitations will have to be managed. As immigration lawyers it is important to be alive to potential issues facing clients amidst the changes to the economic classes, the jurisprudence and other upcoming initiatives in Canadian immigration. For instance, it is important to consider the following:

1. As noted, immigration lawyers' roles on a client matter relating to EE will involve work that may not necessarily result in an immigration application going forward with CIC. Thus the employment of "limited scope retainers" may become commonplace for immigration lawyers and intending EE applicants.
2. In particular pursuant to the Law Society of Upper Canada's *Rules of Professional Conduct*, Rule 1.03 Citation and Interpretation²¹ "limited scope retainer" means the provision of legal services by a lawyer for part, but not all, of a client's legal matter by agreement between the lawyer and the client [New September 2011]
3. The use of this type of retainer is consistent with LSUC Rule 2.01 (h) Relationship to Clients, Competence "*recognizing limitations in one's ability to handle a matter or some aspect of it, and taking steps accordingly to ensure the client is appropriately served*" Under the Barreau du Québec Rules²²:

Division III – Duties and Obligations towards the Client

§1. General provisions

3.00.01. An advocate owes the client a duty of skill as well as obligations of loyalty, integrity, independence, impartiality, diligence and prudence.

3.01.01. Before agreeing to provide professional services, the advocate must bear in mind the extent of his proficiency, knowledge and the means at his disposal. He must not, in particular, undertake or continue to provide any professional services for which he is not sufficiently prepared without obtaining the necessary assistance.

§4. Liability

3.04.01. An advocate shall not, in engaging in his professional activities, elude or attempt to elude his personal civil liability towards the client or the liability of the partnership or joint-stock company within which he engages in his professional activities or that of another person who also engages in his activities therein.

4. Legal Services Under a Limited Scope Retainer, Rule 2.02 reads " Before providing legal services under a limited scope retainer, a lawyer shall advise the client honestly and candidly about the nature, extent and scope of the services that the lawyer can provide, and, where appropriate, whether the services can be provided within the financial means of the client." [New September 2011]. Clients' expectations and the myriad of steps that may or may not result in an immigration application will have to be carefully managed by immigration lawyers. In the Rules /Code of Ethics of the Barreau du Québec:

3.02.03. The advocate must avoid any misrepresentation with respect to his level of competence or the efficiency of his

²¹ <http://www.lsuc.on.ca/with.aspx?id=671>

²² http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=%2F%2FB_1%2FB1R3A.htm

professional services or, if applicable, the competence or the effectiveness of the services provided by persons who carry on their activities within the same partnership or joint-stock company as him.

3.02.04. The advocate must set out in an objective manner to the client the nature and implications of the problem as he sees it on the basis of the facts brought to his attention and of the risks inherent in the measures recommended.

5. Rule 6.01 discusses how, when providing legal services under a limited scope retainer, a lawyer shall confirm the services in writing and give the client a copy of the written document when practicable to do so. [New September 2011] Specifically, the commentary section notes: *“Reducing to writing the discussions and agreement with the client about the limited scope retainer assists the lawyer and client in understanding the limitations of the service to be provided and any risks of the retainer.”* Clients must clearly assume the business risk and with the increased emphasis by CIC on completeness of applications or they will be returned, retainers must be very clear as to the scope of the representation.
6. Lawyers will also have to be mindful when lodging an EE application on a client’s behalf that until the use and dissemination of personal information are clarified there exist very real privacy issues inherent in applying. This too must be clearly set out for clients because if information that is shared triggers enforcement action, a compliance review or a tax audit as a few examples, lawyers may find themselves in the cross hairs. How different this will be compared to filing a current application is unknown.

As set out in the NZ system, information provided under the EOI system is shared with other agencies including those that deal with the entitlement to board a flight to come to or return to NZ based upon the information provided. Rule (1) 2.03 Confidentiality applies. Specifically, *“A lawyer at all times shall hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship and shall not divulge any such information unless expressly or impliedly authorized by the client or required by law to do so.”* In the Rules /Code of Ethics of the Barreau du Québec:

§6. Professional secrecy and conflict of interest

3.06.02. An advocate shall not agree to perform professional services if doing so entails or may entail the communication or use of confidential information or documents obtained from another client without the latter's consent, unless required by law.

7. Credentialing agencies are here to stay. To date, they include: (1) World Education Services; (2) Comparative Education Service; (3) International Credential Assessment Service of Canada; (4) Medical Council of Canada (professional body); and, most recently (5) Pharmacy Examining Board of Canada (professional body). Lawyers need to continue to further their understanding of these credential assessment agencies, how they differ from one another, their advantages and disadvantages etc. and how incorrect or unfair decisions can be reviewed. In the context of the particular circumstances of your client, which one will best meet their needs?

8. Immediate steps on your clients behalf include the basics known to most:
 - Preparation and scheduling of language tests as it takes a few months sometimes to schedule a CELPIP or IELTS test.
 - If the client and/or spouse were educated outside Canada obtain the educational credential assessment unless the foreign national has at least one year of recent work experience in Canada, or their work experience is in a skilled trade. CIC will accept ECA (Educational Credential Assessment) reports for five years from the date of issuance on or after April 17, 2013.
 - Identify the correct NOC depending on work experience. Request a detailed list of duties, period of times they worked in Canada and abroad and their positions. The NOC occupation must be, as is now, at level O, A or B.
9. Be mindful as to whether your client intends to work in a regulated profession, and advise the client to call the relevant regulatory body to determine how early they can start the licensing process.
10. A return to administrative law principles on jurisdiction is necessary given the web of legislation and MIs intertwined in the delivery of the EE program (Rule 2 Relationship to Clients, Rule 2.01 Competence). Lawyers must continue to monitor and/or take the lead in legal efforts to ensure these decisions are not beyond recourse before the Courts. Rule 4 Relationship to the Administration of Justice, Rule 4.01, The Lawyer as Advocate (1) *“When acting as an advocate, a lawyer shall represent the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect.”*

Whose Interests Are Being Expressed?

Clearly one of Canada’s stated goals, like many countries, is to increase global competitiveness surrounding immigration, and a steady increase of immigrants who will contribute to our overall *social* as well as economic wellbeing is crucial to that objective. Former Immigration Minister Jason Kenney has argued that the purpose of eliminating the backlog was to ensure that newcomers meet Canada’s current labour market needs and shortages, and for the country to move toward a “just in time” immigration system. EE does offer exciting possibilities and can be transformative, but not if it is undermined by a lack of transparency, perpetuation of historically poor to neutral relations with authorized representatives, privacy concerns, and traditional processing challenges.

(a) Transparency

Clearly CIC will be learning as will representatives as we move forward under this new system. Leaving incredible scope and implementation to MI opens the initiative, regardless of political party, to serious criticisms and concerns regarding transparency about selection, lack of Parliamentary oversight and potential politicalization of the program. The EE program has surprised some including certain sectors of Canadian industry with the heavy emphasis on the need for LMIA’s. International cues and clues informed us that NZ’s program is primarily an on shore program with 87-89% of its applicants applying in land. Australia is following suit and has edged over 50% of its applicants landing on shore in possession of temporary resident status. If the Canadian focus is to primarily land foreign nationals with LMIA’s or work permits

and this appears to be the case, the messaging should be clear. This program is too important to be undermined by transparency issues.

(b) Representatives

This is an opportunity for CIC to mitigate the perceived perpetuation of historically poor to neutral relations with authorized representatives in the context of processing applications. Unfortunately the fact that questions still surround the functionality of the representatives' portal can send the message that it is an afterthought. In my opinion, to ensure buy in and proper expression of all stakeholder interests, the details of the program should have been fully rolled out and subjected to Parliamentary oversight and approval. Pilot projects for certain visa classes could have been explored for limited periods to collect empirical data especially as it relates to employers' role in the system. This will not happen now but if it may have proven fruitful for CIC and stakeholders. Nevertheless, there is still time. Representatives can assist in the successful delivery of this new program and should be fully engaged in the process. Ongoing stakeholder consultations and correspondence exchange between CIC and CBA have been encouraging signs.

(c) Privacy Concerns

In short, how this information will be used, with what entities it will be shared and for what purposes should be communicated before the acceptance of any on line applications in fairness to all applicants. These issues tie into the concerns regarding transparency.

(d) Further Processing Innovations

CIC hopes to overcome previous backlog issues by processing only those permanent residency applications responding to ITAs; however, this does not overcome the possibility for a backlog to occur in the front-end of the system and specifically at the EE stage where applicants, as described by CIC, need only fill out an online form. Should there be an influx of these pre-screening applications, which officers or a computer system must assess, processing times for a suitable candidate to receive an ITA could lengthen as well as the other concerns highlighted above (frivolous applications, spamming, hackers etc). On the other hand, will the Department be involved in the initial stage of processing EE applications like NZ but unlike Australia? Or, will the computer "assess" the online pre-selection application? We do not have a clear answer. Regardless, we should again look to our international counterparts for innovative processing ideas (front end screening (point threshold as one example), reasonable qualification and language exemptions, multiple visa and point allocation streams, and a fusion of economic and family processing in certain visa classes, as some examples) since we have come this far.

(e) Conclusion

So whose interests will be expressed in this system – applicants, provinces, employers, and/or the economy? We are all hopeful the answer will be all of the above and more but that question cannot be fully addressed until the concerns raised above are resolved. MIs have become part of our working paradigm, altering client expectations and presenting new challenges for immigrant applicants. Most immigration applicants are concerned with processing timelines and employment opportunities, but equally important to them is the certainty of selection. EE will undoubtedly fundamentally alter the manner in which immigration applications are processed. The proffered explanation for this change (including the increasing need for a timely, nimble and proactive immigration system that can look backwards when needed) is a paradigm shift

with as stated, transformative implications. In my view immigration categories cannot become moving targets. We must strive to fashion our immigration law in a manner that preserves our international reputation as a country of invitation, fairness and openness and, at the same time no doubt is responsive but promotes economic, social and cultural nation building on a solid, fair and predictable legal foundation.