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"Qui bene interrogat bene docet" "He who questions well teaches well"

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# The Use of the Term "Significant Economic Benefit" in Immigration Law

Cobus (Jacobus) Kriek and Professor Don De Voretz

*NOTE: Part Two of this article appeared in the previous issue of ImmQuest (Vol. 8, Issue 10).*

## (Part Three)[1]

### *2.6. LEXBASE 2008; Volume 19, Issue 7/8[2]*

In Lexbase, a copy of an email by an HRSDC officer (Ms. Althea Williams) that defined "significant economic benefit" was disclosed and reproduced. It is important to note that the definition is not mentioned in an operational memorandum or in any chapter of the Immigration Manual[3] and, therefore, is not readily available or used as a guideline to officers when decisions are being made about significant benefit. It does not provide a clear definition of "significant economic benefit", but could be seen as a typology or classification of possible areas where significant economic benefit could be achieved. The guideline provided is a

1 Please note that this article consists of several parts and this issue contains Part 3 of this article only – Part 1 appeared in the September issue (8-9) and Part 2 appeared in the October issue (8-10). This portion, Part 3, is the final portion of this article.

2 **Lexbase** is a monthly publication providing current immigration policy and practice information, with annotations of Federal Court of Canada decisions in immigration and citizenship cases rendered during the previous 30 days.

3 The Immigration Manual consists of more than 100 chapters in books and volumes. Published by Citizenship and Immigration Canada - see: http://www.cic.gc.ca/english/resources/manuals/index.asp.

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# The Use of the Term "Significant Economic Benefit" in Immigration Law

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list of indicators for purely economic situations and is referred to as the "Williams Definition" of significant economic benefit.

There are several indicators of economic benefits that can result from the work of a foreign national which would lead an officer to conclude that the test for significant economic benefit could be met. The following list provides some indicators of economic benefit that could apply to situations that are purely economic. This list is not intended to be all inclusive but merely to provide examples of indicators that could be meritorious. Other factors may have compelling merit despite the fact that they are not listed.

Depending on the nature and/or the circumstances surrounding a particular situation, some of the factors enumerated below could be given more weight than others. Some may not apply at all.

- *General Economic Stimulus*: direct impact of a foreign national's employment on the general economic stimulus in Canada which can be taken to mean one or more of the following:
  - job creation or retention at competitive wage rates and working conditions;
  - facilitation of sustainable economic development in a regional or remote setting;
  - secondary benefit accruing to other related industries such as contracts for goods and services granted to suppliers;
  - projects or initiatives that promote or contribute to the long-term sustainable growth and economic stability of Canada or a community in Canada;
  - prospects for improving the productivity of Canadians;
  - the degree to which export markets for Canadian products and services will be expanded;
  - enhanced infrastructure projects such as the expansion of an existing business or the establishment of a new division;
  - prospects for future business opportunities for Canada, such as investment in a relatively small business with a view to pursuing additional business ventures;
  - increased tax revenue.
- *Participation by Canadians*: an assessment of the degree and level of participation of Canadians in a business that shows that the firm is not relying on foreign workers unduly as a source of new hires.
- *Advancement of Canadian Industry*: an assessment of the direct impact of a foreign national's employment on: a) technological development; b) product or service innovation; c) product or service differentiation; d) opportunities for improving the skills of Canadians.
- *Competition within Canada*: an assessment of the direct impact of a foreign national's employment on competition within any industry or sector in Canada.
- *Competition on World Markets*: an assessment of direct impact of a foreign national's employment on Canada's ability to compete in world markets or raise the profile of Canada in a particular sector
- *Savings to Tax Payers*: an assessment of financial savings to municipal, provincial or federal government departments, such as in cases involving training where a government department would be faced with travel expenses in sending employees to a foreign locale unless a foreign national was able to enter Canada to provide the training or monetary savings of any level of government as a result of the foreign national's work.

### 2.7. *Article from ImmQuest Newsletter, Volume 4, Issue 11*

2.7.1 An article about the "Challenges to Intercompany Transfer Policy" appeared in IMMQUEST Newsletter in Nov 08. This article, by Cobus Kriek, delves further into the definition of "significant economic benefit", suggesting more

factors to be considered beyond direct impacting factors on the economy, as indirect effects, and thus factors may also be of great value. These factors in the "Kriek-Definition" include the following:

- Environmental factors with a link to the economy: For example, the contribution of a foreign worker to the economy by decreasing harmful emissions, the use of natural resources generate energy in an environmental friendly manner, or contributions in recycling could all have significant economic benefits.
- Social factors with a link to the economy: Decreasing certain crimes such as software piracy could contribute towards significant economic benefit as well.
- Health factors with a link to the economy: Improving the health of Canadians can also make a significant contribution to the economy in certain situations. Here is a strange example to demonstrate a point: The US government has found that a minimum of $3.6 billion would be saved in the USA if breastfeeding were increased from current levels (64 percent of mothers feeding in hospital periods and 29 percent mother feeding up to 6 months) to those recommended by the U.S. Surgeon General (75 and 50 percent respectively). If a foreign worker can contribute to solving such a medical problem with this type of significant economic benefit, then this type of contribution should be considered under "significant economic benefit".

## 3. Shortcomings of Existing Policy

### *3.1. Lack of Coherent and Extensive Definition*

The existing definitions in the Immigration Manual and case law are scattered across many policy documents and a single coherent definition is not provided to visa officers. Some important case law is not being referred to at all.

### *3.2. Shortcomings of Existing Definitions*

In addition to the scattered nature of the definition, the existing definition(s) has inherent shortcomings as it does not cover all economic factors (i.e. "Williams" Definition) and non-economic factors (i.e. "Kriek" Definition). The relevant chapters of the Immigration Manual do not adequately mention all relevant case law. In the absence of relevant definitions, case law is becoming increasingly important. The existing definitions also do not refer to quantifying significant economic benefit.

### 3.3. Shortcomings in policy of Intra Company Transfers

Before a foreign national may qualify for a work permit based as an intra company transferee, the foreign national must have worked in a similar position at an overseas branch or affiliate for at least 12 months in the preceding 3 years and must be currently working for the overseas branch. Citizenship and Immigration Canada (CIC) has confirmed in writing that these requirements are based on the rules of the NAFTA intercompany transferee policy – it is carbon copy of the NAFTA agreement without any regard for the enabling legislation, IRPR 205 and the term "significant economic benefit". The practical reality is that this requirement does not work in modern multinational organizations, nor in the modern economy of the 21st century. There is no logical connection between "similar position" and significant economic benefit. The similar position requirement is also *ultra vires* the regulations.

This is best illustrated with an example: A Research and Development (R&D) engineer that is working for a German automotive manufacturer, has played a leading role in the development of a thermoplastic wheel cylinder as a replacement of the traditional steel wheel cylinder used in braking systems installed in the wheels of motor vehicles. After developing and perfecting the product, the manufacturer decides to establish a factory in Ontario. The R&D engineer is chosen to become the plant manager as he is the expert with specialized knowledge in the product and has recently completed a six-month, in-house course in the company's manufacturing methodology. The visa officer will deny the application as the positions are not similar, even though both positions required specialized knowledge and the very advanced knowledge is the motivation of the transfer. It would be easy to demonstrate how the appointment of this R&D engineer will contribute to significant economic benefit. Under the existing policy this would not be possible, irrespective of the economic contribution of the foreign worker.

It is suggested that a good immigration law practitioner would say: "Find another way, such as a LMO". However, the availability of alternative methods should not be used as an excuse to not analyze the inherent challenges and problems of existing policies.

The requirement of standardizing with NAFTA on the concept of "similar position" is probably also based on the old idea that people stay in one organization for 30 years within the same area of specialization and that people build a life within a single

occupation. The reality is that people have multiple careers throughout their life and within one organization it is expected that people must be able to multi-task and adapt to the ever-changing business environment due to new technology, political changes, environmental changes, etc.

The world-wide trend in human capital management is the focus on core skills and abilities, as well as the flexible use of these abilities where it is needed in multi-national organizations. Even the Regulatory Impact Assessment of the *Immigration and Refugee Protection Act* and Regulations that was published in the Government Gazette[4] mentions this flexible approach: "The new regulations provide for the selection of Federal Skilled Workers based on a human capital approach for their flexible skills rather than intended occupation".

The assumption that a similar position will ensure that specialized and advanced knowledge or management skills exist before the transfer and be used after the transfer, is also flawed in another way: It assumes that a foreign worker can only manage a certain function of a multi-national company *in Canada*, if the foreign worker has had previous management experience in a similar management position *outside Canada* (before the transfer). Here, follow three examples:

- If the R&D engineer mentioned above was promoted to the R&D manager in Canada based on his specialized knowledge, a work permit would be denied under the program.
- Recently I had a discussion about this policy with a CIC policy advisor in Canada. To demonstrate my point, I asked him, after being in this advisory capacity for several years with an obvious passion for his work and excellent people skills, etc., would he be able to take a program manager position at a foreign visa post? He laughed as he knew where I was going with my question, but he still said, "yes". I then said, 'How can you manage a foreign visa post *outside Canada* without any previous management experience *in Canada*?" We both knew the answer – being ready for a management position in another country requires more than just management experience in the country of origin, but could include having enough specialized knowledge, previous project management experience, management training , inherent leadership skills, etc.
- In practice I have seen a foreign worker holding an MBA specialization in financial management and an Honours Degree in financial management, working in Canada as a specialized knowledge worker in the financial analyses of after-market machinery parts of very specialized earth-moving equipment. After being here for more than a year, the multi-national employer wanted to promote the foreign worker (specialized knowledge worker) to a newly established management position in charge of these types of financial analysts and associated technical sales specialists as she was the most suitable person due to (*inter alia*) her specialized knowledge of the subject and her management degrees. An extension (renewal) of her work permit based on inter-company transferee policy would not be possible as she did not work as a "senior manager" in the overseas branch before coming to Canada, although her employment would be able to create significant economic benefit.

In the case of Australia, the Migration Regulation 1.20 D requires that one of the following four requirements are met in case of an intercompany transfer:[5]

i. the creation or maintenance of employment for Australian citizens or Australian permanent residents; or

ii. expansion of Australian trade in goods or services; or

iii. the improvement of Australian business links with international markets; or

iv. competitiveness within sectors of the Australian economy.

This definition does not require a previous tenure in a similar position as an absolute pre-requisite. There are parallels with the "Williams-Definition" points such as increased competitiveness *within* the national economy. It is interesting to note that the Immigration Manual only refers to competitiveness of Canadian entities in overseas markets while the Australian model specifically mentions the benefit of increased competitiveness of domestic markets.

4 Government Gazette (Canada), 14 June 2002, page 218, Part 2 Volume 136 Extra.

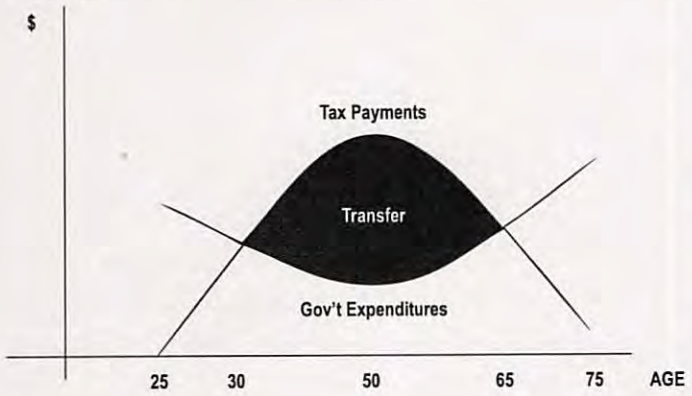
5 Government of Australia, "Subclass 457–Business (Long Stay)–Policy update" *Department of Immigration and Citizenship* (accessed 20 August 2012), online: *Agents Gateway* http://www.immi.gov.au/gateways/agents/news/2009/february/457-policy-changes/.

It would be far more sensible to require that the Canadian employer demonstrate how this specialized and advanced knowledge (or management skills) will provide a significant economic benefit. The requirement and need for a *similar position* is not as sensible as one might believe. It provides a false sense of security and does not guarantee that the foreign worker will contribute to significant economic benefit. It is actually counter- productive towards the actual intent of the policy.

### 4. Methodologies in Quantifying Significant Economic Benefit

One of the shortcomings of the existing policy (guidelines) which invokes the criterion of significant economic benefit is that officers and practitioners are not advised that significant economic benefit can be quantified in a well defined and systematic fashion. However, economists practicing in the applied field of immigration policy, whether in Europe or North America, have carefully and unambiguously defined the nature of economic benefits (and costs) derived from the arrival of economic immigrants over the last 40 years. The earliest definitions owing to Milton Friedman and later Julian Simon limited economic benefits to those conferred on the host country's public treasury. These scholars noted that the majority of public expenditures incurred by the native-born occur in the beginning and end of the native-born life cycle as illustrated below.

**Figure 1: Life Cycle Treasury Transfers**




Given that *economic* immigrants enter at age 25 or older, the heavy education and health costs associated with youth are not incurred by a post-25-year-old economic immigrant. In addition, even if the immigrant remains in the host country until retirement age and beyond, when pension and health costs exceed taxes paid, two economic forces would now offset this potential fiscal deficit. First, discounting the cost of this post-retirement immigrant deficit at any reasonable discount rate (e.g. 3 per cent or more) reduces the present value of these costs at the time of immigrant entry to a trivial amount. In addition, between age 25 and retirement, the typical economic immigrant pays more in taxes than they use in public goods. This life-cycle interpretation of immigrant economic public treasury contributions has been substantiated for *economic* immigrants admitted over the last 40 years in Canada and other countries. In fact, the typical net transfer to the treasury by an economic-immigrant-headed household is positive and equals or exceeds that of the Canadian-born-headed household.

Of course for non-economic immigrants (refugees and family class admissions) the opposite case holds in that non-economic immigrants earn little income, pay little in taxes and intensively use public services and thus their economic contribution through the public treasury is on average negative.

In sum, economists have a well documented method to calculate the public treasury economic impact of both economic and non-economic immigrants. Given this framework, economists initially argued that residents of an immigrant host country should only consider the immigrant's impact on the host country's treasury as an admission criterion since this is the primary economic channel for which all residents absorb the economic impact of an immigrant arrival. Given this narrow definition of "economic benefit", some economists have argued that a host country should continue to admit immigrants until the last immigrant causes a small negative impact on their treasury.

The limitation of this view on the optimal immigrant admission number is that there are several other economic impacts that are derived from the presence of economic (or non-economic) immigrants which are, in turn, absorbed by residents in the immigrant host country. In 2006, DeVoretz provided an exhaustive framework to isolate these additional potential economic benefits derived from an immigrant's entry.[6] These subsidiary potential benefits derived from an economic immigrant include: job creation, wealth accumulation, innovation and the provision of an increased competitive environment. It should be pointed out that many of the more ephemeral benefits derived from immigrants, including international trade creation and foreign

6 Don De Voretz, "Immigration Policy: Methods of Economic Assessment" (2006) 40:2 *International Migration Review.*

investment, are redundant since they are all included in the supplementary elements listed above. In other words, economists have been very careful to avoid double counting. Economists have also been careful not to include the earnings of immigrants themselves when measuring the immigrant's economic impact since immigrant earnings *per se* have no impact on residents in the host country except indirectly (via immigrant tax payments) which has already been taken into account by economists in public treasury calculations.[7]

In sum, the economist's definition of economic benefits circa 2012 includes only the economic impacts of an immigrant on the treasury, wealth and job accumulation and innovation in the general economy since these are the avenues which economically affect the resident population in the immigrant host country. Of course, citing these factors which create positive economic externalities on the resident population is more straightforward than measuring them in the economy, and I will return to the measurement issue below.

At this point, the second issue of significance must be addressed. It should be remembered that most economists do not concern themselves with the term "significance" when assessing immigrant benefits since, as already noted, economists argue that if any immigrant provides a net economic benefit to the treasury, this argues for admission. Thus, the modification of the term "economic benefit" to "*significant* economic benefit" is not owing to a strict economic analysis but is owing to the policy makers' recognition that immigrant entry is not infinite and only the most productive should be admitted. Economists while eschewing the term "significant" as a modifier for immigrant economic benefits can nonetheless modify their definition of "economic benefit" to include the term "significance" to accommodate the policy maker's caution. For any economist, significance is measured in terms of the immigrant's economic contribution to the immigrant host country's economy relative to a reference group's average performance. If we confine ourselves to the concept of immigrant public treasury contributions, then a significant immigrant economic contribution would be defined relative to the average contribution of the host country's resident taxpayer. If, in fact, the average immigrant treasury contribution equals or exceeds the resident's average contribution, then the overall average tax payment of the entire population has risen and this would be considered by an economist to be a significant impact.

This concept of significance can be extended to all supplementary definitions of "economic benefit". For example, a significant act of job creation or wealth accumulation would be defined relative to the host country's resident population's average wealth accumulation level or a Canadian-born entrepreneur's rate and level of job creation.

An illustration of the type of economic calculation required to determine if an economic immigrant provides a significant economic contribution to the host country's treasury could prove instructive at this point. To calculate the size of the tax transfer by the immigrant to the host country's treasury, the following information is required: immigrant age at arrival, immigrant earned income by source, and the immigrant's direct and indirect use of public goods. The outcome of this calculation for an immigrant could then be compared to a similar computation for a native-born taxpayer in the host country. Tables 1 and 2 provide the ingredients for such a calculation for a recent economic (i.e. professionals or managerial occupations) Canadian-naturalized immigrant cohort in (Table 2) *vis a vis* a comparable native-born cohort (Table 1).

**Table 1: Annual Tax Transfer for Canadian-born Males Circa 2006 (in CAD)**

| Age | Tax Transfer | Federal Monies Received | Federal Taxes Paid |
|---|---|---|---|
| 25-35 | 1220 | 260 | **1480** |
| 36-61 | 2550 | 280 | **2830** |
| 62-80 | 1170 | 1740 | **2910** |

Source Canada Census (2006)[8]

**Table 2: Annual Tax Transfer for Professional and Managerial Naturalized Canadian Males Circa 2006**

| Age | Tax Transfer | Federal Monies Received | Federal Taxes Paid |
|---|---|---|---|
| 25-35 | 1900 | 110 | **1790** |
| 36-61 | 4000 | 120 | **3880** |
| 62-80 | 5440 | 1290 | **4150** |

Source Canada Census (2006)[9]

7 The effect of immigrant consumption on employment, however, while difficult to measure would be a valid economic impact to include in the total calculation of the immigrant's economic impact.

8 Author's calculations based on Canadian Census (2006).

9 Author's calculations based on Canadian Census (2006).

An inspection of Tables 1 and 2 reveal that both Canadian-born males and economic class of naturalized Canadian males, on average, provide a positive annual net transfer (Federal Taxes paid–Federal taxes received) in each age category circa 2006. Thus, under the narrow criteria of simply providing positive tax transfers to gain admission, the total naturalized professionally trained immigrant male cohort resident in Canada in 2006 was correctly admitted in under the tax transfer criterion. Moreover, if we add the policy makers' further stipulation that an economic immigrant must provide a *significant* contribution, then this standard is also met in the above case since *economic* immigrants over their lifetime in Canada paid $51,670 more in taxes than all Canadian males born in Canada.[10] If "significance" is defined as exceeding the Canadian-born average, then all economic immigrant age groups working in the professions met this standard circa 2006 in Canada.[11] If we were to broaden the definition of the immigrant class to include all naturalized Canadian males paying taxes in 2006, the results would be altered. Although, the immigrant class would, on average, provide modest net treasury contributions that would not exceed the contributions of all Canadian-born males as reported in Table 1.

A similar analysis of any immigrant cohort's wealth accumulation and job creation impact can be made. However, once the analysis is expanded beyond the limited treasury transfer framework, it seemingly becomes more difficult to measure the combined economic impact on the treasury, job creation and wealth accumulation. However, since job creation and wealth accumulation can be monetized, the addition of these effects to the economist's concept of an economic impact is, in reality, straightforward. For example, if an economic immigrant has a lifetime wealth accumulation or net worth of $1 million dollars versus $800,000 for a Canadian-born, then this excess of $200,000 difference in total net worth would be added to the economic immigrant's excess in taxes paid ($51,670) to yield a total gain to the Canadian residents of $256,670 from the admission of this economic immigrant.[12] Since this gain is a byproduct of the fact that in both the wealth accumulation and tax transfer dimensions, the economic immigrant outperforms the resident Canadian-born, this by definition illustrates that this economic immigrant provides a significant economic contribution to the host country.[13]

In sum, in the modern economic era, the economic contribution of an immigrant can be measured in three dimensions and monetized to yield a dollar figure of the impact of this immigrant on the host country's population. In addition, comparison of this immigrant contribution to the relevant host-country-born cohort allows an assessment of the contribution's significance.

## 5. Advice to Federal Government

5.1. Remove the requirement of "similar position" and replace it with a clause: "demonstrate how the specialized knowledge or management skills will contribute to significant economic benefit". The obsession with a "similar position for 12 months" (which was a copy from NAFTA policy) is inconsistent with the statutory or regulatory provision mentioned in Regulation 205(a).

5.2. It is suggested that U.S. immigration policy is not copied in Canada immigration rules blindly. Canadian policies should be developed within the parameters of our own regulations. The copying of U.S. policy has not resulted in intra-company transferee's making an optimal significant economic benefit to our economy.

5.3. Keep a requirement that a foreign worker must have specialized or advanced knowledge or have senior or executive management experience, but allow movement between specialized knowledge worker and senior or executive management positions at the time of the transfer or extension of the work permit.

5.4. It can be seen that the provincial and federal governments have provided short descriptions of the significant economic benefit scattered in a confetti-style distribution pattern over IRPR 205, IRPR 88, Immigration Manual Chapter FW1, Immigration Manual OP8, as well as several Provincial-Federal agreements without a single coherent in-depth definition of the term "significant benefit" in one policy document. The inherent advantages of bringing foreign nationals to Canada that can provide a significant economic benefit can be easier to achieve if a more in-depth discussion

10 *Supra* note 6.

11 One important caveat remains – not all professionally qualified immigrants can gain admission into their professions while resident in Canada, and hence this positive result only applies to immigrants who can practise in a profession.

12 See DeVoretz, *supra* note 6, for the calculation of the immigrant's total net worth.

13 A similar calculation could be conducted for immigrant job creation by valuing the job created by the discounted value of the lifetime earnings stream and adding it to the treasury transfer and wealth accumulation figures cited above.

(provision of guidelines) of the meaning of the term "significant economic benefit" is provided in the Immigration Manual as we have attempted with this article.

5.5. Discuss the role of facilitation versus control in the policy. Support this attitude of facilitation with training and guidance. The recent policy change that requires a foreign intra-company transferee to be currently working for a foreign entity before the transfer (in addition to the long-standing, 12-month experience) is an indication of an increasing restrictive policy without much regard for its enabling regulations.

5.6. Remove instructions in Chapter FW 1 of the Immigration Manual officers which suggest that a business of a foreign national that competes with businesses that are owned by Canadians has a negative impact on significant economic benefit. This has no place in a modern economy.

## 6. Advice to Immigration Law Practitioners

6.1 Lobby for policy change through lobbying groups such as CBA and CAPIC and through direct requests to members of parliament and the Minister of Immigration and Multiculturism.

6.2 Discuss all the relevant building blocks or pre-requisites of significant economic benefit that is spread over the primary and secondary sources as discussed above in submissions. Show the relevance of each rule or guideline mentioned in the Immigration Manual or relevant case in a submission. Be prepared that officers might not be aware of all the definitions in the possible primary and secondary sources as discussed in this article.

6.3 In the case of provincial entrepreneurs, it is important to refer to the cases of *Chhibber vs Canada*[14] and *Zheng vs Canada*,[15] where it is clearly mentioned that business factors and significant economic benefit factors are inextricably linked. Claims that significant economic benefit will be achieved in the future cannot be provided in isolation – the business plans, available capital, skills, market knowledge, analyses of competition in a certain geographical area (significant economic benefit is always relative), the demonstrated ability to create a profit in a similar business outside of Canada, discussion of relevant governmental priorities (federal, provincial and municipal), etc. must be provided to support arguments about future significant economic benefit.

6.4 Use the expert opinions of Chartered Accountants, Certified General Accountants, Certified Canadian Management Consultants (see http://www.cmc-canada.ca) as well as members of the Society of Strategic and Competitive Intelligence Professionals (SCIP). See http://www.scip.org; members of SCIP are experts in the analyses of competition. Also consider using an expert opinion by an economist to quantify a significant economic contribution of an applicant as explained by Professor De Voretz.

6.5 Study relevant areas of specialization by reading articles and books. Use this knowledge in arguments of significant economic benefit. Some examples are as follows:

- To obtain a basic understanding of the technique of quantifying economic benefit, read articles such as "Immigration Policy: Methods of Economic Assessment" that was published in International Migration Review (Summer 2006, Vol. 40, No. 2).
- Reading the book "The New Competitor Intelligence: The Complete Recourse for Finding, Analyzing and Using Information about your Competitors", by Leonard Fuld (published by John Wiley and Sons:1995) will contribute to understanding the analyses of competition in a specific geographical area of Canada – describing competition is pivotal to demonstrate that significant economic benefit can be achieved in the future in a specific industry in a specific area of Canada.

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14 *Chhibber v. Canada (Minister of Citizenship & Immigration)*, 1998 CarswellNat 1410, Doc. IMM-2937-97 (Fed. T.D.).

15 *Zheng v. Canada (Minister of Citizenship & Immigration)*, 2003 FCT 54, 2003 CFPI 54, 2003 CarswellNat 111, 2003 CarswellNat 623, [2003] F.C.J. No. 69, 228 F.T.R. 118, 26 Imm. L.R. (3d) 86 (Fed. T.D.).