



THE CANADIAN BAR ASSOCIATION  
L'ASSOCIATION DU BARREAU CANADIEN

May 20, 2008

Ms. Heidi Smith, Director  
Permanent Resident Policy and Program Development Division  
Immigration Branch  
Citizenship and Immigration Canada  
Jean Edmonds Tower South, 8th Floor  
365 Laurier Avenue West  
Ottawa, ON K1A 1L1

Dear Ms. Smith:

**Re: Proposed Regulations on Language Testing – *Canada Gazette, Part I, April 19, 2008***

On behalf of the Citizenship and Immigration Law Section of the Canadian Bar Association (CBA Section), I am writing to comment on the proposed amendments to the *Immigration and Refugee Protection Regulations*.<sup>1</sup> We have long advocated permitting the in-Canada landing of temporary residents, and applaud the government's initiative in implementing this change. However, we have concerns about the proposed amendments removing the option of providing a written submission to demonstrate language competency, and instead require mandatory language assessment. These proposed changes will have a detrimental effect on skilled worker immigration to Canada. We previously addressed this issue in our submission dated February 11, 2008, relating to the Canada Experience Class. We elaborate upon these concerns below.

### **Mandatory Testing is Unnecessary and Excessively Burdensome**

We believe that mandatory language testing imposes an excessive and unnecessary burden on prospective applicants who are already fully proficient in English or French and who are nationals of countries such as the US, the UK or France. Language testing potentially involves a significant time commitment,<sup>2</sup> cost, and stress for applicants. This is particularly the case if the testing facility is in a remote location requiring special travel arrangements and accommodations.

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<sup>1</sup> See Regulations Amending the Immigration and Refugee Protection Regulations (Permanent Residents), C. Gaz. 2008. I. 1208-1209.

<sup>2</sup> We estimate that the time required for testing could be as high as 3-5 days when all aspects of the process, including travel, study, and completing the three hour test are considered.

Highly qualified candidates who would otherwise be perfectly suited to assimilate linguistically into Canada may be discouraged by the burden imposed by mandatory testing.

Further, we believe foreign students in Canada should also be exempted from the mandatory testing requirements if they hold a Bachelor's, Master's or Doctoral degree granted by an accredited university in Canada and the language of instruction or research was English or French. Foreign students generally undergo language testing prior to their entry to Canada for admission or registration purposes. Additional testing is therefore redundant.

### **Comparative Analysis: UK and Australia**

It is useful to compare the proposed language requirements with those of two other major immigrant destination countries – the UK and Australia.

#### **United Kingdom**

The Tier 1 General Highly Skilled Migrants program (GHSM), introduced in February 2008, is a points-based assessment system to screen highly skilled applicants who wish to acquire permanent residence in the UK. The GHSM is analogous to Canada's Skilled Worker Program.

Under the GHSM, applicants must score 10 points for English language ability. In order to score the required 10 points, an applicant must satisfy one of the following requirements:<sup>3</sup>

1. Demonstrate knowledge of English equivalent to level C1 of the Council of Europe's Common European Framework for Language Learning. The applicant can establish level C1 equivalence by:
  - a. Providing an original English language test certificate from an English language test provider approved by the Secretary of State. A large number of language tests and testing bodies are on the approved list, including the International English Language Testing System (IELTS). The British Council has determined that level C1 is equivalent to an IELTS overall band score of 6.5; or
  - b. Holding an academic qualification which meets or exceeds the standard of a UK Bachelor's, Master's or Ph.D. degree and was taught or researched in English to level C1. The UK degree and C1 teaching language requirements must be certified by The National Recognition Information Centre for the United Kingdom (UK NARIC), the UK's official provider of comparison information and advice on international education and training systems and overseas skills and qualifications;<sup>4</sup> or
2. Being a national of one of the following countries: Antigua and Barbuda, Australia, The Bahamas, Barbados, Belize, Canada, Dominica, Grenada, Guyana, Jamaica, New Zealand, St. Kitts and Nevis, St. Lucia, St. Vincent and The Grenadines, Trinidad and Tobago, or the US; or

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<sup>3</sup> See Appendix B of the *Rules* under the *Immigration Act 1971* (U.K.), 1971, c.77.

<sup>4</sup> It is important to note that this service also exists in Quebec, through the Ministère de l'Immigration et des Communautés culturelles (MICC).

3. Holding an academic qualification which meets or exceeds the standard of a UK Bachelor's, Master's or Ph.D. degree as certified by UK NARIC from an educational establishment in Antigua and Barbuda, Australia, The Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Ireland, Jamaica, New Zealand, St. Kitts and Nevis, St. Lucia, St. Vincent and The Grenadines, Trinidad and Tobago, the UK, or the US.

The UK system is a particularly relevant standard to consider in the Canadian context because the UK's language testing scheme must be compliant with s.14 of the *European Convention on Human Rights*, which is similar to s. 15 of the *Canadian Charter of Rights and Freedoms*.

### **Australia**

Under the General Skilled Migration (GSM) Subclass 175 Independent Migrant Visa, analogous to Canada's Skilled Worker Program, applicants whose native language is English and who are passport holders of Canada, New Zealand, UK, US or Ireland are exempted from English language testing.

For applicants from other countries, different levels of English-language skills are required depending on the occupation of the applicant. Australia primarily uses IELTS for English language testing. Skilled trade applicants must achieve a score of "Vocational" (at least five on each of the four components of the IELTS test). All other applicants must achieve a score of "Competent" (at least six on each of the four components). Another testing regime, the Occupational English Test (OET), is used for applicants applying on the basis of certain occupational specialties that require higher English language skills, such as health professionals. Successful test results no more than two years old must be submitted with the application.

### **Objective Benchmark for Exempting Applicants from Mandatory Language Testing**

An objective benchmark can be established to exempt applicants from the proposed mandatory language testing requirement. This benchmark would be based on the National Adult Literacy Rate Statistics (aggregated for males and females aged 15 and older), as reported in the Human Development Index developed by the United Nations Human Development Programme (UNDP) and published as part of its annual Human Development Report (HDR).<sup>5</sup> The literacy statistics are collected by UNESCO's Institute for Statistics (UIS), which has been involved in compiling measurements of national literacy rates for over 35 years. The national estimates are obtained from national censuses or surveys between 1995 and 2005. Where recent estimates are not available, the country's literacy rate is based on older UIS estimates, produced in July 2002 and based mainly on national data collected before 1995.<sup>6</sup>

Many high-income countries having already attained high levels of literacy no longer collect the full range of literacy statistics required by UIS and, as a result, are not included in the UIS data. UNDP's team of internationally respected statisticians and demographers resolved this problem by assigning a value of 99% to the literacy rates of these non-reporting, high-income countries for purposes of calculating their HDI. This statistical adjustment is now an accepted and standard feature of the HDI methodology.

<sup>5</sup> Online: <http://hdrstats.undp.org/indicators/3.html>.

<sup>6</sup> See footnote 2 to the HDI Adult Literacy Rates by Country, online: <http://hdrstats.undp.org/indicators/3.html>.

## Alternative Legislative Proposal to Mandatory Testing

The CBA Section proposes an alternative to the requirement of mandatory language testing in the proposed regulation. The amended section 79(1) would instead read as follows:

- 79 (1) A skilled worker must specify in their application for a permanent resident visa which of English or French is to be considered their first official language in Canada and which is to be considered their second official language in Canada and must:
- (i) Have their proficiency in those languages assessed by an organization or institution designated under subsection (3),  
or
  - (ii) Have completed secondary school or resided for ten years or more in, and be a passport holder or permanent resident of, any country whose national or official language is English or French and which has a literacy rate, as reported in the most recently published HDI, equal to or greater than 90%,<sup>7</sup>  
or
  - (iii) Be the holder of a university degree at the Bachelor's, Master's or Doctoral level of any country whose national or official language is English or French and which has a literacy rate, as reported in the most recently published HDI, equal to or greater than 90%, if the language of instruction or research was English or French, or
  - (iv) Be the holder of a university degree at the Bachelor's, Master's or Doctoral level granted by an accredited university in Canada and the language of instruction or research was English or French.

## CBA Legislative Recommendation Constitutional

We respectfully submit that our proposed scheme complies with s.15 of the *Canadian Charter of Rights and Freedoms*. Equality jurisprudence is clear that mere differential treatment of applicants does not constitute discrimination.<sup>8</sup> Indeed, sometimes difference in treatment is required to achieve fairness.<sup>9</sup>

Our proposal allows for exemptions not only based on the national or official languages of countries of origin, but on demonstrated competence in English or French through higher level

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<sup>7</sup> An alternative to our proposed clause (ii) would be a “Be a passport holder of any country whose national or official language is English or French and which has a literacy rate, as reported in the most recently published HDI, equal to or greater than 90%.”

<sup>8</sup> *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497.

<sup>9</sup> *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

academic study. Rather than being stereotypical or arbitrary, these requirements are based upon the actual circumstances of applicants<sup>10</sup> relating to their linguistic fluency.

Further, any constitutional concerns about a possible breach of *Charter* s.15 should be considered in light of s.1. We submit that the alternative draft constitutes a reasonable limit on any purported breach of equality rights of applicants who do not meet the stated criteria. They constitute a rational, proportional and reasonable approach to avoid mandatory testing of all applicants without recognition of the demonstrated language skills of a number of such applicants. If the legislation is appropriate to its ends and is carefully designed to meet its purposes, it passes constitutional scrutiny.<sup>11</sup> The s.1 requirement of minimal impairment means that the law must be tailored so that rights are impaired no more than necessary. It is not a standard of perfection and some deference in that regard would be afforded to the government.<sup>12</sup>

### **Alternative Proposal: Retain Current Regulations with Modification for Skilled Trades**

As a further alternative to the proposed mandatory testing, we recommend that CIC maintain the regulatory status quo in s. 79 (1) (b) (that the applicants be able to “provide other evidence in writing of their proficiency in those languages”). This authorizes a waiver of the test requirement, while maintaining the discretion of immigration officers. The stated goal of additional objectivity and transparency for testing can be accomplished by providing visa officers with guidance in accordance with the HID and educational literacy guidelines and by giving further particulars of “other evidence in writing” options on the CIC website.

The current language testing benchmarks are exceptionally rigorous, time consuming and academic, involving advanced grammar, syntax and essay writing.<sup>13</sup> The current test design is inappropriate for tradespeople, who need not adhere to a rigorous grammatical standard to practice their trade. Current testing disqualifies most tradespeople from achieving the points required under the skilled worker criteria. The “tools of the trade” for tradespeople are their skills, not their language ability. We would encourage considering the average IELTS benchmark score rather than individual ones. For many skilled trades, an average total of 4.5 would be a more reasonable threshold on the IELTS rather than achieving this score in each of the four areas. This is consistent with the Australian model which requires ‘functional’ English for the trades.

### **Conclusion**

Mandatory testing of all applicants is not a practical or reasonable approach to the legitimate goal of ensuring that the language assessment process is objective and transparent. It will result in the unnecessary testing of many applicants who are already fully proficient in English or French. For these applicants, many of whom will be highly educated, highly skilled, and already working in Canada, testing will be enormously burdensome, time consuming and costly. It will be a serious disincentive to becoming Canadian permanent residents.

<sup>10</sup> *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429.

<sup>11</sup> *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713).

<sup>12</sup> *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199.

<sup>13</sup> See the sample questions on the IELTS website, online:  
[http://www.ielts.org/candidates/find\\_out\\_more/free\\_samples.aspx](http://www.ielts.org/candidates/find_out_more/free_samples.aspx).

We recommend a more nuanced and objective approach to language assessment. Our proposed scheme, based on the UN Human Development Index, is objective and establishes uniform criteria for determining national literacy rates. It takes into account the applicant's education and nationality in a manner consistent with similar international immigration country practices. It eliminates redundant testing and ensures that applicants who are proficient in Canada's official languages are fairly recognized as such.

We appreciate the opportunity to provide input on the proposed regulations, and would be pleased to discuss the matter further with you and your staff.

Sincerely yours,

*(original signed by Kerri A. Froc for Alex Stojicevic)*

Alex Stojicevic  
Chair, National Citizenship and Immigration Section