Principal Comments of Canada on the *Revised Preliminary Draft Convention on the International Recovery of Child Support and other Forms of Family Maintenance*

In preparation for the Diplomatic Session of November 5-23, 2007 in The Hague, the Government of Canada submits its principal comments on the *Revised Preliminary Draft Convention on the International Recovery of Child Support and other Forms of Family Maintenance* (Revised Preliminary Draft Convention) and invites you to circulate such comments to other States. These are not final comments on the issues underlined and do not constitute all the comments Canada has regarding the Revised Preliminary Draft Convention. We look forward to discussions at the Diplomatic Session.

Terminology:

1. We have noticed that the English language text of Chapters V, VI and VIII of the Convention uses the terms "requested State" and "State addressed" inconsistently. We would suggest that the proper corrections be made to ensure consistency.

2. In addition, we suggest that the definition of "creditor" in Article 3 of the Convention be clarified. In the Draft Explanatory Report (p. 82, paragraph 484), it is stated that "the term "creditor" includes, without any doubt, the child for whom maintenance was ordered". However, elsewhere in the Report, the term "creditor" appears at times to exclude the child (see for example, paragraphs 310, 312 and 320 of the Report dealing with Article 11 of the Convention). Canada is of the view that this issue is of importance in the application of the Convention, notably with respect to Article 15, which could be referring to the custodial parent's habitual residence, the child's habitual residence or both. Clarification of the exact meaning of the term "creditor" should therefore be sought.

Scope (Article 2):

3. Canada would prefer that the Convention include claims for spousal support made in combination with claims for maintenance in respect of children. Therefore, we would suggest retaining the bracketed text at Article 2(1).

4. In addition, we believe that the provisions of the Convention should apply to children regardless of the marital status of the parents, and therefore, that the text in square brackets should be retained at Article 2, paragraphs 3 and 4.

Requests for specific measures (Article 7):

5. We support the inclusion of the provisions at Article 7 concerning requests for specific measures, but feel strongly that it must be clear that performance of such measures are discretionary on the part of the requested Central Authority.

6. We support the inclusion of the text in square brackets in the second sentence of Article 7(1) in order to clarify that the requests referred to in (1) must be tied to a potential application under Article 10.

7. We support the inclusion of the text in Article 7(2).

Application contents (Article 11):

8. Canada feels strongly that additional protections should be provided for the applicant at Article 11. Canada believes that applicants should not be required to provide their personal address on documents that will be sent to the requested Central Authority where they have chosen to make their application through the Central Authority in their State. It should be made clear that the address of the requesting Central Authority may serve as an acceptable address to be provided to the requested Central Authority for the purposes of Article 11 Option 1 (1) b), particularly where disclosure of the applicant's address might jeopardize their health, safety or liberty. This will remove the burden from the requested Central Authority of ensuring that the applicant's personal address is not inadvertently disclosed in proceedings in the requested State. The applicant will be required to provide a personal contact address to the requesting Central Authority which will be retained by that Central Authority for contact purposes. Moreover, the applicant should have discretion to request that the contact address of their choice (e.g. their personal address, the Central Authority address, or the address of a third party) be provided to the requested Central Authority. If an applicant's personal address is required by a competent authority or the law of the requested State, the requested Central Authority can so inform the requesting Central Authority. The applicant will then have the option of choosing to disclose her personal address or to discontinue her application. In our view, this would be consistent with Article 37. If this is not made clear in the text of the Convention, it should be made clear in the Explanatory Report.

9. Further consideration should be given to providing mechanisms, possibly in the text of the Convention, to ensure that the Central Authority of the requesting State is kept informed of any direct contact that is made between the Central Authority of the requested State and the applicant, where the former seeks to collect additional information and that such direct contact should be limited to exceptional circumstances.

Means of Communications – Admissibility (Article 13)

10. Canada is of the view that Article 13 should be redrafted in order to provide for a more general admissibility of documentation transmitted through Central Authorities. The Draft Explanatory Report at line 369 states that the language of Article 13 is borrowed from the *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.* Although Article 13 was inspired by Article 30, Article 13 really focuses on the medium or means of communication as opposed to being a more general admissibility provision like Article 30.

11. We also suggest that it would add value to this article to include direction to competent authorities to give a broad and liberal interpretation to documentation transmitted through Central Authorities. This will allow for appropriate effect being given to documentation received by a competent authority where the documentation is not in the form customarily in use in internal proceedings before the competent authority.

12. Please refer to Canada's drafting proposal for Article 13.

13. In light of Canada's proposal to broaden the focus of this article, we also propose that the heading be changed accordingly.

Effective access to procedures (Article 14):

14. Canada prefers Article 14, Option 2. Canada takes the position that for policy, economic and political reasons, free or low cost services must be made available to both creditors and debtors as applicants.

15. It is Canada's view that restricting services to creditors is not in the child's best interests. It appears unjust and may be discriminatory; will likely discourage debtor participation in the process; could lead to increased costs for the State and may lead to a lack of confidence in the system on the part of other participants, including the judiciary.

16. Furthermore, the exclusion of debtors from Article 14 may impact negatively on the creditor by resulting in unenforceable orders where debtors have no real access to modification procedures.

17. This exclusion from effective access to modification procedures for debtors together with the restriction set out in Article 15 on a debtor's ability to bring modification proceedings in his own State creates an unpalatable situation at the political level. There is little flexibility in this position.

Free legal assistance for child support applications - Option 2, Article 14 bis:

18. Our strong preference would be the extension of free services in all child support applications, with the exception of costs for genetic testing.

19. Canada supports a merit test for the issue of appeals. Particularly where free services are provided for applications, States must retain discretion to limit access to free legal assistance for appeals in order to use their resources responsibly. States must have the discretion to determine the most appropriate appeal cases on which to spend public money. Requested States are in the best position to assess the merits of a particular appeal request taking into account all relevant factors, including the applicable law and the scope or standard of appellate review in that State.

Article 14 bis c):

20. Canada is concerned about the practicality of what will trigger an examination of whether the financial circumstances are "exceptionally strong" and what the requesting State will have to provide to satisfy the requested State. However, Canada prefers Article 14 bis c), Option A to Article 14 bis c), Option B, given the heavy administrative burden that would be imposed under the latter.

Procedure on an application for recognition and enforcement (Article 20):

21. In general, Canada is satisfied with the text of Article 20. However, it would be preferable that there be no ex officio review at the stage of registration. If this is not possible, then Canada would want, in paragraph 4, to limit the ground to that in Article 19 a).

Physical presence of the child or applicant (Article 25):

22. Canada believes that presence of the child or applicant, in any form, should not be required in any proceedings in the requested State and that therefore the word "physical" should be removed from Article 25. We would also suggest that the Article be moved under Chapter VIII of the Convention so that it would apply to all applications.

Authentic instruments and private agreements (Article 26):

23. Canada supports the inclusion of authentic instruments and private agreements in the Convention. We suggest that Article 26(5) specify which competent authority by adding at the end of the sentence "…in the State of origin." We are satisfied that the safeguards set out in Article 26 are sufficient.

Public bodies as applicants (Article 33):

24. With respect to Article 33, public bodies should be permitted to apply, not only for recognition and enforcement of a decision, but also for the establishment or modification of an order under Ch. III. Article 33 should therefore be modified to provide public bodies with these possibilities.

25. In addition, at paragraph 1, after the phrase "to whom maintenance is owed", we suggest adding, "or is allegedly owed", in order to account for the cases where an application for establishment of a decision has been made. We also suggest adding, in the same paragraph, the word "payment" to that of "reimbursement" so to provide for recovery of maintenance in all situations, i.e. past, present and future. Finally, for the purposes of consistency, we suggest replacing the words "in lieu of", in the English language text, with the words "in place of", already used in paragraph 2 and 3 b) of this Article.

Direct requests (Article 34):

26. In the case of Article 34, Canada would prefer that reference to Article 14(5) be removed, if Option 1 is chosen. If Option 2 is chosen, then reference to Article 14 ter b) should be removed. We would prefer that this change be made (in Option 1 or Option 2) because if a direct application is made, the applicant should not benefit from the free services provided by Central Authorities. The Central Authority system is set up for administrative ease therefore to encourage direct applications would run contrary to this objective. States that provide free services for applications through Central Authorities should not be obliged to provide free services for direct applications. Finally, for the purposes of clarity, we suggest that the term "national law" in paragraph 1 be substituted by "internal law".

Non disclosure of information (Article 37):

27. Canada supports the Forms Working Group proposal that suggests the following wording for Article 37(3): "Nothing in this provision shall impede the gathering and transmitting of information by and between authorities in so far as necessary to carry out the obligations under this Convention". [1]

Non-unified legal systems (Article 43), and Co-ordination of instruments and supplementary agreements (Article 45):

28. Article 43 paragraphs (2) and (3) address substantive issues regarding internal conflict situations involving solely the different territorial units within States that have non-unified legal systems. These issues are separate from the rules of construction that apply in relation to such States, which are set out in Article 43(1). Given the distinct nature of these provisions, Canada suggests that paragraphs (2) and (3) constitute stand alone articles as is the case in other Hague Conventions in the area of family law. In addition, the use of the term "court" in Article 43(3) is too restrictive. Canada suggests replacing it by the term "competent authority".

29. To account for the particularities associated with the establishment and application of agreements or reciprocity arrangements in non-unified judicial systems like Canada, we propose to add a paragraph at Article 43 that will make clear that agreements and reciprocity arrangements that are the subject of Article 45 paragraphs 2 and 3 shall be construed as referring, where appropriate, to an agreement or a reciprocity arrangement in force in the relevant territorial unit.

30. Canada wishes to indicate that the French and the English versions of Article 45(1) of the Revised Preliminary Draft Convention are inconsistent. The French version refers

[1] See Report of the Forms Working Group, Preliminary Document No 31-A of July 2007 for the attention of the Twenty-First Session of November 2007 at p. 10, online: http://www.hcch.net/upload/wop/maint_pd31ae2007.pdf

to international instruments to which Contracting States are, or will become, Parties ("sont, ou seront"), while the English version refers only to those to which Contracting States are Parties.

31. In Preliminary Document No 18 (June 2006), the use of "are, or will become, Parties" was suggested (see Article B (1), on p. 19), which would indicate that the wording in the current French version is correct. However, in reference to Article 45(1), the provisional version of the Draft Explanatory Report provides that "*(t)his paragraph concerns only prior agreements. It is in line with the usual compatibility clauses which are found in numerous conventions*" (see Preliminary Document No 32, August 2007, p. 116, para. 661), which would indicate that the wording in the current English version is correct.

32. Canada proposes that clarification regarding the States' intention concerning the coordination of international instruments be sought and that the wording used in Article 45(1) and, if necessary, in paragraph 661 of the Draft Preliminary Report, be modified accordingly.

33. Canada suggests that the expression "reciprocity schemes" in Article 45(3) be replaced by "reciprocity arrangements", terminology generally used in the context of the international system of bilateral cooperation based on reciprocity. We also suggest notice may be given of those arrangements and uniform laws to the depositary of the Convention.

34. Please refer to Canada's drafting proposal for Articles 43 and 45 for more details.

Transitional provisions (Article 50):

35. Canada is satisfied with the text of Article 50 as it stands and would support retention of the text in square brackets.

Provision of information concerning laws, procedures and services (Article 51):

36. Canada would like to express its support for the current text of Article 51 and the Country Profile. We suggest, however, that the text in square brackets at Article 51, paragraph 2 be removed.

Signature, ratification and accession (Article 52):

37. Given Canada's experience implementing other Hague Conventions, in particular the *Convention of 29 May 1993 on the Protection of Children and Co-operation in respect of Intercountry Adoption* and the *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, we prefer Article 52, Option 1, and in Option 1, the second version of paragraph 5. Option 2, which makes acceptance automatic if no opposition is submitted within six months, does not provide Canada with enough time to conduct adequate consultations with provinces and territories.

Adequate consultations must be completed in Canada before a decision can be taken regarding accession.

Declarations with respect to non-unified legal systems (Article 56):

38. Canada is satisfied with the text of Article 56 as it stands.

Notification (Article 60):

39. Canada prefers Article 60, Option 2.