### **Index**

# ABSTRACT OR ACADEMIC QUESTIONS

definition, 71 exceptions, 82-83 evidentiary foundation, 80-82 sufficient facts for adjudication, 73-76 test cases, 76-80

#### ADMINISTRATIVE LAW

prematurity, 45-46

# **ADVISORY OPINIONS**, see **RIPENESS**, **DOCTRINE OF**

# ALTERNATIVE GROUNDS IN RIPENESS DECISIONS

definition, 83-84 exhaustion doctrine, 89-103 unnecessary questions, 84-89

#### **ANTICIPATED MOOTNESS**, 154

# APPEAL, JUSTICIABILITY RAISED AT

mootness, 272

notice of appeal, justiciable issue in, 271

#### AUSTRALIA

political questions doctrine, 170-176

#### BOROWSKI (NO. 2) DECISION, see MOOTNESS, DOCTRINE OF

#### CANADIAN CHARTER OF RIGHTS AND FREEDOMS

section 1, 207-213 section 2, 77 section 2(b), 65, 73-74, 80, 199, 210 section 7, 58, 60-61, 95, 187, 205, 208, 242 section 11, 37, 288 section 11(d), 82 section 12, 49, 51, 52 section 15, 19, 86, 88, 119, 121, 123, 290 section 23, 121, 145 section 24, 66, 67, 146 section 32, 85, 225, 227

#### **CANADIAN CONSTITUTION**

intergovernmental relations, 233-234, 239-241
"judicature" sections, 37, 288
preamble, 22, 26, 37, 38, 288
section 35 and 35(1), 245
section 36, 233-235, 237, 239-241
section 52, 16
section 96, 17
section 101, 22, 37-38
separation of powers, 13, 14, 16-17

## CHECKS AND BALANCES, 15, 19, 164

CONSTITUTIONAL CONVENTIONS, 11-12, 217-222

# CROWN PREROGATIVE POWERS, see PREROGATIVE POWERS

**DECLARATIONS**, 39

#### **DECLARATORY ACTIONS**

standards of justiciability, 272-275

#### EXHAUSTION DOCTRINE

American approach, 90, 97 civil actions against the Crown, 99-103 fragmentation, 94 human rights cases, 90-92, 97 principles guiding exercise of discretion, 90

#### FRAGMENTATION, 94

#### GOVERNMENT ACTION FAILING TO RAISE LEGAL ISSUES

generally, 204-206, 216 section 1 of *Charter*, 207-213

"legal component" approach, 209 Oakes test, 209 remedial discretion, 213-216 wisdom vs. validity of government actions, 205-206, 210

#### HIERARCHY OF GOVERNMENTAL FUNCTIONS, 15-16

#### **HYPOTHETICAL QUESTIONS**

abstract or academic questions definition, 71 evidentiary foundation, 80-82 exceptions, 82-83 sufficient facts for adjudication, 73-76 test cases, 76-80 definition, 48 rationale for not deciding questions, 48 speculative or contingent questions generally, 53-54 "reasonable likelihood" test, 62-71 "susceptibility to proof" test, 54-62 use of hypothetical examples, 49-

# INTERGOVERNMENTAL RELATIONS, DISPUTES INVOLVING

Canada Health Act, 235-236 Canada Health and Social Transfer, 237-238 s. 36 of Constitution Act, 233-234, 239-241 shared cost programmes, 234

#### INTERLOCUTORY **INJUNCTIONS**

standards of justiciability, 276-277

INTERNATIONAL AGREEMENTS, see POLITICAL QUESTIONS **DOCTRINE** 

#### INTERNATIONAL DISPUTES, see POLITICAL QUESTIONS **DOCTRINE**

#### JUDICIARY

as independent institution, 17-18 hierarchy of governmental functions, 15-16 judicial economy, efficiency and effectiveness, 290 judicial economy, mootness and, 130-151 legitimacy of courts to entertain claims, 291-293 proper role, 151-153 relationship to other branches of government, 18-23 reticence on social and economic rights, 242-243 source of judicial independence, 17-18

#### **JUSTICIABILITY**

American approach, 24-27 "appropriateness", 9 definition, 6-10 enforceability, distinguished from, 11-12 overview, 27-30 pragmatic and coherent approach generally, 283-289 institutional capacity, 289-291 adversarial system, 290-291 judicial economy, efficiency and effectiveness, 290

legitimacy of courts, 291-293 private vs. public law settings, 12-13 procedural issues, see PROCEDURAL ISSUES separation of powers, see **SEPARATION OF POWERS** 

standing, distinguished from, 10-

U.K. approach, 23-24

#### "LEGISLATIVE PROCESS" **DOCTRINE**

formulation and introduction of bills, 197-200 policy development vs. legislative process, 199

#### MOOTNESS, DOCTRINE OF

American approach, 108-110 Borowski (No. 2) decision anticipated mootness, 154 application of Borowski criteria causes of mootness factual changes, 124 legal changes, 120-124 failure of courts to apply principles, 158 when moot cases will be heard adversarial nature of dispute, 125-130 judicial economy generally, 130-131 likelihood of recurrence and evasiveness of issue, 134-143 practical effect on parties' rights, 131-134 public interest and

social cost of

Canada Health and Social uncertainty, 144-Transfer, 237-238 151 whether issue of mootness s. 36 of Constitution Act, to be considered, 119-233-234, 239-241 shared cost programmes, Borowski (No. 2) framework 234 and criteria for deciding international disputes mootness, 114-118 foreign state, actions of, costs where matter not decided 250-251 because of mootness, 154international agreements, 155 245-248 interests of justice, 155-158 international law, 248-250 mootness prior to decision, matters failing to raise legal 111-114 issues proper role for judiciary, 151existence of political 153 questions doctrine in definition, 107-108 Canada, 185-187 generally, 110-111 governmental action, 204remedial discretion, 213-**PARLIAMENTARY PRIVILEGES**, 223-225 Section 1 of the Charter, 207-213 "PLAIN AND OBVIOUS" TEST, "legislative process" 268, 269 doctrine, 197-204 "purely political" matters, POLITICAL QUESTIONS 187-197 **DOCTRINE** Parliamentary privileges, 223-American approach, 164-170 225, 232 rival approaches to doctrine, prerogative powers, 225-233 166-167 social and economic rights, modern doctrine as established disputes involving, 242-244 in Baker v. Carr. 167-169 definition, 161-164 origin, 164-165 Israeli approach, 182-185 Australian approach, 170-176 British approach, 176-182 PRELIMINARY MOTIONS Crown prerogative powers, accepting facts as pleaded, 267deference to, 176-180 268 Canadian approach 185-253 judiciable issues, 269 Constitutional conventions, "plain and obvious" test, 268, 269 217-222 generally, 251-253 **PREMATURITY** intergovernmental relations, administrative law, 45-46

Charter cases, 42-45

American approach, 44

disputes involving, 233-241

Canada Health Act, 235-

236

concreteness, 47 generally, 40-41 "private" law, 46 when premature case should be heard, 41-42

#### PREROGATIVE POWERS, 176-

180, 215, 225-233

#### "PRIVATE" LAW

justiciability, 12-13 prematurity, 46

#### PROCEDURAL ISSUES

appeal, justiciability raised at, 271-272 generally, 256-257 preliminary motions, 267-270 Quebec Code of Civil Procedure, Article 55, 256-257, 261- 267 standards of justiciability declaratory actions, 272-275 interlocutory injunctions, 276-277 references, 277-280 standing, 257-261 criteria for granting standing, 258-260 definition, 257 trial, justiciability raised at, 270-271

#### PUBLIC INTEREST STANDING see STANDING

#### "PURELY POLITICAL" **MATTERS**

American approach, 187-189 test, 195-196

#### QUEBEC CODE OF CIVIL PROCEDURE, ARTICLE 55

generally, 261-262 relationship to constitutional law principles, 266-267

"sufficient interest" standard, 262-264

#### "REASONABLE LIKELIHOOD" TEST, see HYPOTHETICAL **QUESTIONS**

#### REFERENCES

standards of justiciability, 277-280

#### **RIPENESS, DOCTRINE OF, 31-**

alternative grounds, 83-103 "exhaustion" doctrine, 89-103 American approach, 90, 97 civil actions against the Crown, 99-103 fragmentation, 94 human rights cases, 90-92, 97 principles guiding exercise of discretion, 90 unnecessary questions, 83-89 American approach, 34-36 advisory opinions, 34-35 categories, 35-36 Canadian approach, 36-40 as a common law requirement, 37-38 definition, 32-34 hypothetical questions, 36, 38, see also HYPOTHETICAL **QUESTIONS** prematurity

administrative law, 45-46 Charter cases, 42-45 American approach, 44 concreteness, 47 generally, 40-41 "private" law, 46 when premature case should be heard, 41-42 proper scope for judicial review, test for determining, 103-104 statutory law, 38-39

declarations, 39 interlocutory injunctions, 39 references, 38 standing, 39

#### SEPARATION OF POWERS

American vs. Canadian concept, 13-15
Canadian Constitution, 13, 14, 16-17
hierarchy of governmental functions, 15-16
judicial review, 20-23
judiciary as independent institution, 16-18
judiciary's relationship to other branches of government, 18-23
justiciability, relationship to, 20

## SHARED COST PROGRAMMES, 234

## SOCIAL AND ECONOMIC RIGHTS

arguments, 243-244 definition, 242

## SPECULATIVE OR CONTINGENT QUESTIONS

generally, 53-54 "reasonable likelihood" test, 62-71 "susceptibility to proof" test, 54-62

#### **STANDING**

criteria for granting standing, 258-260 definition, 257 justiciability, distinguished from, 10, 11 ripeness, and, 39

#### "SUSCEPTIBILITY TO PROOF" TEST, see HYPOTHETICAL QUESTIONS

# TRIAL, JUSTICIABILITY RAISED AT, 270-271

#### UNITED KINGDOM

justiciability, 23-24 political questions doctrine, 176-182 Westminster system, 15

#### **UNITED STATES**

advisory opinions, 34-35
Article III of U.S. Constitution,
24, 25, 26, 34, 108, 165, 277,
288
exhaustion doctrine, 90, 97
hypothetical questions, 48, 59
justiciability, 24-27
mootness, 108-110
political questions doctrine, 164170
prematurity, 44
ripeness, doctrine of, 34-36
separation of powers, 13-15

#### **UNNECESSARY QUESTIONS**

constitutional questions not put before court, 85-87 deciding case on federalism or *Charter* grounds, 87-89 deciding case on nonconstitutional grounds, 84-85