

Table of Contents

Table of Cases	ix
Introduction	1
Chapter 1 An Overview of the Law of Justiciability in Canada	5
Introduction	6
1. Defining Justiciability	6
(a) Justiciability Distinguished from Standing	10
(b) Justiciability Distinguished from Enforceability	11
(c) Justiciability in Private and Public Law Settings	12
(d) Conclusion	13
2. The Separation of Powers in Canada	13
3. Comparative Approaches to Justiciability	23
(a) The Law of Justiciability in the United Kingdom	23
(b) The Law of Justiciability in the United States	24
4. An Overview of Justiciability in Canadian Law	27
Chapter 2 The Doctrine of Ripeness	31
Introduction	32
1. The American Law of Ripeness	34
2. The Canadian Law of Ripeness	36
(a) Prematurity	40
(i) Prematurity in Charter Cases	42
(ii) Prematurity and Administrative Law	45

(iii) Prematurity and “Private” Law	46
(iv) Conclusion	47
(b) Hypothetical Questions	48
(i) Speculative or Contingent Questions	53
A. The “Susceptibility to Proof” Test	54
B. The “Reasonable Likelihood” Test	62
(ii) Abstract or Academic Questions	71
(c) Alternative Grounds	83
(i) Unnecessary Questions	84
(ii) The “Exhaustion” Doctrine	89
Conclusion: Towards a Test for Ripeness	103
 Chapter 3 The Doctrine of Mootness	105
Introduction	107
1. The American Law of Mootness	108
2. The Canadian Law of Mootness	110
(a) Mootness Prior to <i>Borowski</i>	111
(b) The <i>Borowski</i> Framework and Criteria for Deciding Moot Cases	114
(c) The Application of the <i>Borowski</i> Criteria	119
(i) Must the Issue of Mootness be Considered?	119
(ii) What are the Causes of Mootness?	120
A. Legal changes	120
B. Factual changes	124
(iii) When Will Moot Cases be Heard?	125
A. Adversarial nature of the dispute	125
B. Judicial economy	130
(1) The “practical effects on the rights of the parties”	131
(2) The likelihood of an issue to recur and the evasiveness of an issue for review	134
(3) Public interest in the decision and the “social costs of uncertainty”	144
(c) The Proper Role for the Judiciary	151
(d) Beyond <i>Borowski</i>	154
(i) Anticipated Mootness	154
(ii) Costs Where a Matter not Decided Due to Mootness	154
(iii) The Interests of Justice	155
Conclusion	158

Chapter 4 Political Questions	159
Introduction	161
1. Anglo-American Approaches to Political Questions	164
(a) The American “Political Questions” Doctrine	164
(b) The Australian “Political Questions” Doctrine	170
(c) The British “Political Questions” Doctrine	176
(d) The Israeli “Political Questions” Doctrine	182
2. Towards a Canadian “Political Questions” Doctrine	185
(a) Matters Which Fail to Raise Legal Issues	185
(i) “Purely Political” Matters	187
(ii) The “Legislative Process” Doctrine	197
(iii) Disputes Regarding the Wisdom of Government Action	204
A. “Second Guessing” government decisions under section 1 of the Charter	207
B. Remedial Discretion	213
(iv) Conclusion	216
(b) The Justiciability of Constitutional Conventions	217
(c) Parliamentary Privilege and Prerogative Powers	222
(i) Parliamentary Privileges	223
(ii) Prerogative Powers	225
(iii) Conclusion	232
(d) Disputes Involving Intergovernmental Relations	233
(e) Disputes Involving Social and Economic Rights	242
(f) Disputes Involving the Enforcement of International Agreements, the Application of International Law or the Actions of Foreign States	244
(i) International Agreements	245
(ii) International Law	248
(iii) Actions of a Foreign State	250
Conclusion	251
Chapter 5 Procedural Dimensions of Justiciability	255
Introduction	256
1. The Procedural Settings of Justiciability	257
(a) Justiciability and Standing	257
(b) Justiciability and Article 55 of the Quebec <i>Code of Civil Procedure</i>	261
(c) Justiciability and Preliminary Motions	267
(d) Justiciability at Trial	270

viii Table of Contents

(e) Justiciability on Appeal	271
2. Procedure and the Standards of Justiciability	272
(a) Declaratory Actions	272
(b) Interlocutory Injunctions	276
(c) References	277
Conclusion	280
Chapter 6 Conclusion: In Search of a Canadian Doctrine of Justiciability	283
1. Justiciability: A Pragmatic & Coherent Approach	283
(a) Institutional Capacity	289
(i) Judicial Economy, Efficiency and Effectiveness	290
(ii) The Adversarial System	290
(b) Legitimacy	291
2. Beyond a “Smell Test” for Justiciability	293
Index	297