Notes:

1. This is an open book examination. You may bring into the examination your own notes, the textbook, and any materials posted on the course website. You cannot have access to the internet during the examination.

2. This examination consists of 2 parts. Please answer both parts of the examination. Each question is weighted, and given an approximate time, as set out below. Students are cautioned to allocate their time accordingly.

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<td>TOTAL</td>
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3. Please double-space your written answers and, if you’re writing by hand, please write as legibly as you can.

4. Good luck!
Amy grew up on the north coast of British Columbia. On March 24, 1989, when Amy was 17 years old, the Exxon Valdez oil tanker ran aground, spilling more than 10 million gallons of oil into the waters of Prince William Sound. For the next several months Amy volunteered for Greenworld, a self-proclaimed anti-corporate, left-leaning environmental NGO. She worked in the Sound to save wildlife affected by the spill. Before she went to university in the fall, she set up an automatic $20 monthly contribution to Greenworld. Although that was the last time she actively volunteered for Greenworld, she has remained a member of the organisation, and to this day donates $20 a month.

Amy meets Bill in 2004 in Vancouver, and in 2006 they are married. Bill is the same age as Amy (43 in 2015) and works as a flight attendant. He has worked in that capacity for Air Canada for 18 years. A pre-requisite of his job is a security clearance issued by Transport Canada, which grants him access to restricted areas of airports in Canada. Bill has to renew his security clearance every five years. His initial application and his renewal applications for security clearance have always been approved without delay. Bill has never been arrested or convicted of a crime.

In 2009, Bill converts to Islam. He begins to attend a local mosque in which some religious leaders are, at the time, giving impassioned speeches against Canadian military involvement in Afghanistan. In 2011, a number of individuals who attend the mosque are arrested and charged with conspiracy to commit acts of terrorism.

In August 2013, volunteers from Greenworld go to the Beaufort Sea ice floes north of Tuktoyaktuk, NWT, to protest Victoria Oil Resources Ltd.'s proposal to drill deepwater oil exploration wells in Arctic waters. The Inuvialuit First Nation has a land claim extending into the Beaufort Sea, and has entered into a self-government agreement with the federal government.

On August 10, 2013, in stormy weather, Canadian Coast Guard officials try to board one of the Greenworld vessels involved in the protest. One Coast Guard official falls into the sea and loses her life, while two others are injured attempting to board. The Coast Guard claims that several activists resisted their efforts to board. The crew from the Greenworld vessel denies those claims. Several activists from the Greenworld ship are later charged with assault, and their cases are still before the courts.

In Fall 2014, as part of its ongoing effort to ensure that charitable organisations are not used as fronts for terrorist groups, the Minister of Public Safety orders a review of registered charitable organisations, including
Greenworld. In a press conference on October 24, 2014, the Minister explains that as a consequence of the August 2013 violence involving a Greenworld vessel and the Coast Guard, Greenworld is being stripped of its registered charitable status and placed on a watch list.

On November 8, 2014, Bill receives a letter from Transport Canada advising him that the Transportation Security Clearance Advisory Board (Advisory Board) would be reviewing his security clearance. The letter informs Bill that the purpose of the review is to make a recommendation to the Minister of Transport with regard to that clearance. He is asked to provide the Advisory Board with any additional information he might wish to provide before the recommendation is made.

Excerpts from the relevant statutory scheme are included beginning at page 7 of this examination. Under subsection 4.3(1) of the Aeronautics Act, management of the Transportation Security Clearance Program (the Program) is entrusted to the Director of Security Screening Programs of Transport Canada (the Director). The Program itself is established pursuant to s. 4.8 of the Aeronautics Act and s. 3.1 of the Canadian Aviation Safety Regulations. The Advisory Board assists the Director who, on behalf of the Minister, grants security clearances for access to restricted areas. The Advisory Board also reviews the files of security clearance holders when it receives information that casts doubt on the fitness of an individual to hold a security clearance. The Advisory Board is presently made up of three persons: the Director of Security Screening Programs, Transport Canada; the Director of Intelligence, Canada Border Services Agency (CBSA); and a Transport Canada security inspector.

Upon further inquiry with the Director of Security Screening Programs, Bill learns that the Advisory Board is reviewing his file for two reasons. First, he is subject to review because his wife, Amy, is a member of Greenworld, and Greenworld has recently been placed on a watch list on account of the events in the Beaufort Sea in August 2013. Second, the Director advises Bill that his membership in a “mosque that harbours militants” is cause for grave concern, especially as they had information confirming that Bill had spoken on more than one occasion with one of the men now charged with conspiracy to commit acts of terrorism. Flabbergasted, Bill writes to the Director insisting that he is just a hard-working, tax-paying, law-abiding citizen. On December 28, 2014, the Director replies to Bill that he “should state his case clearly to the Advisory Board in writing,” and that Bill “may be interviewed prior to the Board making a recommendation to the Minister that might adversely affect his security clearance status.”

Bill proceeds immediately to state his case in a letter to the Director, explaining that he has never had anything to do with Greenworld, and that his wife’s sole involvement with the group for almost 25 years had been a modest monthly contribution and pro forma membership. He further claims that he does
not know the men charged with conspiracy to commit acts of terrorism, and that they were in fact *persona non grata* (i.e., unwelcome) in his mosque. Bill focuses on the specifics of the charge against him, and makes no reference to any broader questions of freedom or rights.

Time passes. Bill hears nothing further from the Advisory Board for several weeks. Finally, on February 21, 2015, he receives a letter from the Director on behalf of Transport Canada, which reads:

*Our Government and our Ministry take a zero tolerance policy approach toward threats to national security. Following our internal consultations and our review and consideration of the material and evidence submitted, in its entirety, and specifically having considered these issues:*

- *the Advisory Board was unanimous in recommending that your security clearance be cancelled;*
- *according to the Advisory Board, the Transportation Security Clearance Program, paragraph I.4.(b), addresses your personal membership in a mosque that harbours suspected terrorists, and prior contact with same; and,*
- *according to the Advisory Board, the Transportation Security Clearance Program, paragraph I.4(c), addresses your marriage to a member and financial supporter of Greenworld.*

*We hereby advise you that the Minister has cancelled your security clearance. You may apply for a review of this decision before the Federal Court of Canada within thirty (30) days of receipt of this letter.*

The letter is copied to Air Kanada. A week later Bill receives a notice from Air Kanada, advising him that he has been suspended from work with pay and will ultimately be terminated for cause unless he is able to obtain a security clearance within 90 days.

Bill is stunned. In all his years in the airline industry, and in spite of his many contacts across the country, he has never heard of something like this happening to a crew member like him. As he tells you later, he cannot believe that he did not have an opportunity to present his case before the Advisory Board; he does not know what transpired in the weeks that he was waiting for a response to his letter; and he cannot comprehend the final decision. He falls into a depression and hardly leaves his home for several weeks. But ultimately, on April 1, 2015, he shows up at your law firm. He would like to file a petition
before the Federal Court of Canada, seeking judicial review of the Decision. Your senior lawyer, Ms. Honda, is eager to take on the case. These security clearance cancellation provisions have never been subject to judicial review before, and she believes they are ripe for challenge. She asks you to write a memo addressing the following issues, considering both the relevant law and how they apply to these facts:

a) Is the Federal Court of Canada likely to consent to judicially review the Minister’s decision? Explain. [6 points]

b) Did either the Advisory Board or the Minister owe Bill a duty of procedural fairness (including any potential right to an impartial decision maker) or an obligation to observe the principles of fundamental justice? If so, were these duties met? What are the specific procedural defects that Bill could allege? Speak to the likelihood that a reviewing court would find that any such alleged breaches have actually occurred. [22 points]

c) Not including any Charter issues (which are discussed in the next question), did the Minister commit reviewable substantive error with respect to its finding that Bill’s security clearance should be cancelled as it was? Identify the likely standard of review. Explain why it applies and what it requires. Apply the standard of review, specifically addressing the possible substantive shortcomings in the order that Bill could allege. Speak to the likely outcome on judicial review. [20 points]

d) Did the Minister commit reviewable substantive error in failing to consider Charter values in making its order cancelling Bill’s security clearance? Identify and apply the appropriate standard of review. Explain your answer, including a specific description of how the court would approach the question and the likely outcome on judicial review. [6 points]

e) Bill would like to “cancel” the Hearing decision, and to compel Air Kanada to reinstate him to his position. He would also like $10,000 in damages to compensate him for the emotional pain and suffering the Minister’s decision has caused him. Determine what remedies are available to Bill, and explain your reasoning. [7 points]

f) Now, imagine that this entire scenario took place at the provincial level rather than the federal one. Imagine that the decision-making body in question is the Safety Standards Appeal Board, which has jurisdiction over an imaginary provincial act called the Aeronautics Act that is identical in substance to the attached federal one. How would this change your assessment of Bill’s case? Answer questions (a), (c) and (d).
above as if the BC Safety Standards Appeal Board had made the decision in question. [5 points]

In your answers, please

1. do not discuss the substance of the law governing employment discrimination, aeronautics, national security or provincial safety standards.

2. note that Aeronautics Act and associated documents, attached, are not exactly the same as any real statute or associated documents. Do not rely on any experience you may have with any actual similar enactment.

3. even though you are acting as counsel to one party, please be as objective as possible in your assessment of Bill’s situation.

4. if you are missing information that you consider necessary, identify the information you are missing and state how it would affect your answer.

MARKS

34 Part 2: POLICY QUESTION (60 minutes)

As the majority noted in the Khosa case at paragraph 59, the standard of review of reasonableness is “a single standard that takes its colour from the context”, and “it requires deference”.

In each of the Dunsmuir (2008), Khosa (2009) and Alberta Teachers (2011) cases, the appropriate standard of review was held to be reasonableness. Compare and evaluate how the reasonableness standard of review operates in each of these cases. Assess whether, based on these cases, the reasonableness standard strikes an appropriate balance between ensuring and protecting the rule of law, while also demonstrating respect for legislative intent and the statutory scheme. Explain your assessment, being as specific as possible, and provide recommendations as appropriate.

END OF EXAMINATION
QUESTION ONE: RELEVANT STATUTORY PROVISIONS


Definitions

3. …

“security clearance” means a security clearance granted under section 4.8 to a person who is considered to be fit from a transportation security perspective;

“Minister” means

(a) subject to paragraph (b), the Minister of Transport or any other Minister that is designated by the Governor in Council as the Minister for the purposes of this Act, and

(b) the Minister of National Defence — or, under the direction of the Minister of National Defence, the Chief of the Defence Staff appointed under the National Defence Act— with respect to any matter relating to defence, including any matter relating to any of the following:

(i) military personnel, a military aeronautical product, a military aerodrome or military equipment of Canada or a foreign state, or a military facility of Canada or a foreign state relating to aeronautics, and

(ii) a service relating to aeronautics provided by such personnel, by means of such an aeronautical product or such equipment or at such an aerodrome or facility;

Delegation by Minister

4.3 (1) The Minister may authorize any person or class of persons to exercise or perform, subject to any restrictions or conditions that the Minister may specify, any of the powers, duties or functions of the Minister under this Part, other than the power to make a regulation, an order, a security measure or an emergency direction.

Aviation security regulations

4.71 (1) The Governor in Council may make regulations respecting aviation security.

(2) Without limiting the generality of subsection (1), regulations may be made under that subsection
(a) respecting the safety of the public, passengers, crew members, aircraft and aerodromes and other aviation facilities;

(b) respecting restricted areas in aircraft or at aerodromes or other aviation facilities, including regulations respecting their identification, access to them and their administration or management;

...

(g) requiring any person or any class of persons to have a security clearance as a condition to conducting any activity specified in the regulations or to being

(i) the holder of a Canadian aviation document,

(ii) a crew member, or

(iii) the holder of a restricted area pass

(h) respecting the making of applications for security clearances and the information to be provided by applicants;

Security Clearances

4.8 The Minister may, for the purposes of this Act, grant or refuse to grant a security clearance to any person or suspend or cancel a security clearance.

Decision final

4.9 The Minister’s decision is final and binding and not subject to appeal or review by any court on any basis whatsoever.

**Canadian Aviation Security Regulations, SOR/2011-399**

1. The definitions in this section apply in these Regulations.

   “Act” means the *Aeronautics Act*.

   “Minister” means the Minister of Transport.

Security Measures

3. (1) The Minister is authorized to make orders with respect to aviation security...including orders prescribing security measures, applicable to ...
(c) persons who provide services to an air carrier that are related to the transportation by air of passengers or goods;

(d) persons who carry on a commercial activity or provide a service at an aerodrome.

4. The Minister may establish such policies and procedures as it deems necessary in the conduct of its determinations.

Transportation Security Clearance Program (from Transport Canada’s Website)

Aim

I.1 The aim of the Transportation Security Clearance Program Policy is the prevention of unlawful acts of interference with civil aviation by the granting of clearances to persons who meet the standards set out in this Program.

Objectives

I.4 The objective of this Program is to prevent the uncontrolled entry into a restricted area of a listed airport by any individual who

   a. is known or suspected to be involved in activities directed toward or in support of the threat or use of acts of serious violence against persons or property;

   b. is known or suspected to be a member of an organization which is known or suspected to be involved in activities directed toward or in support of the threat or use of acts of serious violence against people or property;

   c. is suspected of being closely associated with an individual who is known or suspected of:

      (i) being involved in activities referred to in paragraph (a);

      (ii) being a member of an organization referred to in paragraph (b) ...

Advisory Board

I.8 An Advisory Board shall review applicant’s information and make recommendations to the Minister concerning the granting, refusal, cancellation or suspension of clearances.
II.31 The Advisory Board shall consist of the Director, Security Screening Programs, who is the Chairperson, and at least two other members selected by the Director, Security Screening Programs, based on his or her familiarity with the aim and objective of the Transportation Security Clearance Program.

Review of Security Clearance

II.29 Where information is made available that raises doubts as to the appropriateness of the holder retaining a security clearance, the Director, Security Screening Programs, may suspend the holder’s security clearance and shall inform the holder in writing and the aerodrome operator.

Cancellation or Refusal

II.35 The Advisory Board may recommend to the Minister the cancellation or refusal of a security clearance to any individual if the Advisory Board has determined that the individual’s presence in the restricted area of a listed airport would be inconsistent with the aim and objective of this Program.

**Canadian Charter of Rights and Freedoms**

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

2. Everyone has the following fundamental freedoms:

   a) freedom of conscience and religion;

   b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

   (c) freedom of peaceful assembly, and

   (d) freedom of association.

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.