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## Public Secrets: Canada's Surveillance State

### 2013 Members' Evening & Reg Robson Award

Thank you for being a member and supporter!

We've got something important coming, and we want you to know all about it.

Join us for the presentation of our 2013 Reg Robson Award and a panel on surveillance and spying in Canada.

The evening includes a cocktail reception and panel discussion. This event is free to members and their guests.

Visit [bccla.org/events](http://bccla.org/events) for more info.

## The Washington Statement:

BCCLA calls for increased data protection

Last month, working with an international coalition of privacy advocates, BCCLA Policy Director Michael Vonn initiated and co-authored a consensus statement calling on the European Union to increase its data protections.

Called the "Washington Statement," it comes hot on the heels of revelations regarding US surveillance program

PRISM and related surveillance programs around the world.

Why is it so important for the BCCLA to push for strong data protection in the European Union?

Canada's privacy laws follow the EU model of regulation, which is viewed as the global privacy standard. That "gold" standard is now under attack. The EU is currently revising its data protection framework. This revision process has given the US and US internet companies a vast campaign aimed at weakening the EU's stringent privacy standards.

What would it mean for Canada if the EU's data protections were

eroded? The bottom line is that if the EU does not hold to a high privacy protection standard, Canada and other countries will find it almost impossible to maintain strong privacy laws. We'll see a race

to the bottom on privacy protection globally. "Harmonization" will drag us all down to the lowest common denominator.



A dozen groups from both sides of the Atlantic joined BCCLA in the "Washington Statement," including the ACLU, the Electronic Privacy Information Center, European Digital Rights, and Privacy International.

The statement warned policymakers that *"Our common future, on both sides of the Atlantic, needs privacy and a strong European law. We call on European policy makers to defend this human right now, as an essential prerequisite for preserving privacy, freedom of thought and of expression in vibrant democracies."*

The BCCLA is proud to be at the forefront of this important issue.



## Letter from the President / Lindsay Lyster

### WHY DOES THE BCCLA SAY TWU'S "COMMUNITY COVENANT" SHOULD NOT PREVENT IT FROM HAVING AN ACCREDITED LAW SCHOOL?

The BCCLA has taken the position that Trinity Western University should not be barred from establishing a law school accredited by the Canadian Federation of Law Societies because its students and faculty are required to sign a Community Covenant.

By that Covenant they commit, among other things, to "observe modesty, purity and appropriate intimacy in all relationships, reserve sexual expressions of intimacy for marriage, and within marriage take every reasonable step to resolve conflict and avoid divorce". Given that the Covenant provides that "sexual intimacy is reserved for marriage between one man and one woman", this means that TWU's students and faculty promise not to engage in homosexual sex.

The BCCLA's position has been controversial in some quarters, disappointing some of our members, supporters and allies. How, they wonder, can the BCCLA support an organization that discriminates against members of the GLBTQ+ community? Don't we believe in equality?

As a long-time advocate for GLBTQ rights, and as a queer

person who would neither sign such a covenant nor attend a university that had such a requirement, I can understand those concerns. But I still believe the BCCLA got it right on the question of whether TWU's Covenant should bar it from having an accredited law school. Let me try to explain why.

As civil libertarians, we value the fundamental freedoms of people to come together with like-minded persons to express and seek to further their conscientiously held beliefs. That's what s. 2 of the Canadian *Charter of Rights and Freedoms* is all about, protecting our freedoms of association, of assembly, of belief and of expression.

Those freedoms are called "fundamental" for a reason – without them we would have no right to hold or express our conscientiously held beliefs, religious or not, or to join with others, whether to worship, to educate, to celebrate, to create art, for mutual support, or to work for political, social or economic change.

Remember that no one is forced to attend or teach at TWU. There are many other post-secondary institutions

available to those of us that have no desire to attend a private, faith-based university.

Remember that that the Covenant is a promise made by those who have voluntarily chosen to attend TWU, and one which says nothing about anyone else's behavior – it is a commitment about one's own behavior only.

The Supreme Court of Canada recognized the unique nature of an institution such as TWU in its 2001 decision upholding the right of graduates of TWU's Faculty of Education to be accredited as teachers. It stated:

*Although the Community Standards are expressed in terms of a code of conduct rather than an article of faith, we conclude that a homosexual student would not be tempted to apply for admission, and could only sign the so-called student contract at a considerable personal cost. TWU is not for everybody; it is designed to address the needs of people who share a number of religious convictions. That said, the admissions policy of TWU alone is not in itself sufficient to establish discrimination as it is understood in our s. 15 jurisprudence. It is important*

*continued on page 11*

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## VICTORIES FOR RIGHTS

Thanks to your support, the BCCLA has celebrated many victories for rights and freedoms in 2013. Here are five of our favourites.

### ● Management Protocol Ended

The Management Protocol was a program for high-risk women prisoners that allowed prison officials to isolate women in solitary confinement for months and years at a time. The vast majority of the women placed on the program were Aboriginal. Women had to earn their way out of solitary confinement and could be returned to it for virtually any reason. In the same month that the BCCLA filed a lawsuit on behalf of Bobby Lee Worm, a woman on the program, Correctional Services Canada announced that it would end its use of the program across Canada.

### ● Special Prosecutor Appointed

Six years after the police shooting death of Paul Boyd, BC's Criminal Justice Branch has finally appointed a special prosecutor to reconsider laying charges in the case. This move happened only after video footage came to light which showed that Boyd was crawling on the ground at the time he was shot by police.

### ● Premiers Support National Inquiry

On June 24, 2013 provincial and territorial premiers backed the creation of a national

commission of inquiry into missing and murdered Indigenous women of Canada. This national tragedy demands an immediate national response.

### ● Proportionality in Sentencing

In *R. v. Pham* the Supreme Court recognized that collateral immigration consequences are a relevant factor in sentencing and can be taken into account by appellate courts when reviewing whether a sentence is just and fit. The BCCLA intervened in the case, and celebrated the Court's finding that such consequences may be taken into account as relevant personal circumstances in the sentencing process.



BCCLA Policy Director Micheal Vonn in Washington

### ● BCCLA Goes to Washington

The Computers, Freedom and Privacy conference gathers together the key players in international privacy advocacy.

This year, a meeting of global activists was scheduled to work

on the most pressing privacy issues. BCCLA was one of only two Canadian representatives invited to this international working meeting. Sitting at the table for Team Canada were Micheal Vonn, Policy Director of the BCCLA and Professor Andrew Clement of the University of Toronto.

# It's Secret Spying Scandal Week!

By Greg McMullen

*The BCCLA hosts guest blog posts in order to further public discussion on topics of interest. This guest blog is authored by BCCLA Board Member, lawyer Greg McMullen.*

The last two months brought shocking revelations about the scale of spying programs operated by governments around the world, including Canada. The ongoing story broke in a single week in June. Here, we offer a quick review of the revelations of early June and our thoughts on the efforts of governments around the world to excuse their unaccountable snooping.

## June 5th – Verizon spying order

First we learned that Verizon is subject to an order from a secret court requiring it to collect and disclose information on every phone call made on their network to the U.S. National Security Agency (“NSA”). This “metadata” includes: the originating and terminating phone numbers and the time and duration of the call. The order had a gag provision preventing Verizon from discussing the existence of the order.

## June 6th– PRISM's direct line to internet companies

Next we learned about PRISM, an NSA program that allows spies with easy access to the data we send to major internet companies, including Microsoft, Google, and Facebook, and to access email, voice and video chat, photos, stored data, file transfers, and other social networking activity from those service providers.

## June 7th – PRISM spreads to the UK

PRISM isn't limited to the U.S. Spies in the U.K. were given access to the same database as their American counterparts, allowing British spies to circumvent domestic legal processes required to obtain the personal information of its citizens.

## June 9th – The whistleblower revealed

Edward Snowden, a 29 year old former contractor for the NSA, came forward as the whistleblower who leaked the NSA documents to the press. Why did he do it? In his words: “My sole motive is to inform the public as to that which is done in their name and that which is done against them.”

BC Civil Liberties Association

info@bccla.org / www.bccla.org

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*The Democratic Commitment is a publication of the British Columbia Civil Liberties Association. The BCCLA mandate is to preserve, defend, maintain and extend civil liberties and human rights across Canada through public education, complainant assistance, law reform and litigation.*

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### June 10th – Canada's spying program

The Globe and Mail reported that the Communications Security Establishment of Canada ("CSEC") has a metadata spying program similar to PRISM.

Even now, we continue to learn more about the capabilities of the NSA spying program, including the recently revealed "XKeyscore" program that makes sense of all the metadata the NSA harvests.

So, what does the BCCLA think about the top three of the excuses offered by governments around the world to excuse their unaccountable spy-on-everyone snooping?

#### 1. It's only metadata!

Metadata, like that collected by PRISM, matters. In an era of "big data" and data-mining, it is disingenuous for our leaders to claim we have nothing to fear from their spying on information about our communication. Metadata is our data, and it often says more about us than the content of the communication itself.

#### 2. It's only foreigners!

Everyone is a foreigner somewhere. While the CSEC says it does not "target" Canadians, Canadians are fair game for spies at the NSA and in the U.K. Cross-border data sharing

is alive and well, and undermines even the minimal protections that are in place through the secret programs. Without a system of checks and balances on both the spy programs and the cross-border sharing programs, the "only foreigners" argument is meaningless.

#### 3. We act within the law!

How can we trust the same governments that have authorized secret programs to spy on us for years when these programs stay secret and avoid oversight? Apart from a few leaked documents, we know very little about these programs and government representatives continue to avoid any real accountability or oversight.

While mystery remains, we know that these spying programs are incredibly broad and lack meaningful oversight from elected representatives or the courts. We continue to have serious questions about the legality of these programs.

The BCCLA will continue to pressure the government to come clean on its spying programs and cross-border data sharing. You can consider writing to your MP to demand answers, or visiting our friends at OpenMedia.ca and signing their No Secret Spying petition at [secretspying.ca](http://secretspying.ca).

## Pride & Privacy: Don't Spy on Me!



For the 35th anniversary of Vancouver Pride, the BCCLA reflected on the role privacy has played in protecting LGBTQ+ people and winning LGBTQ+ rights.

The BCCLA invited festival goers to join our photo petition, letting the government know that online privacy matters to them. More than 110 photos were taken, sending their message to Canada and the world's governments: "Don't Spy on me!"

More online! <http://bccla.org/2013/08/pride-privacy>.

# 2013 Liberty Awards



On June 12, 2013 the BCCLA was delighted to host our second annual Liberty Awards Gala, recognizing exceptional contributions to human rights and civil liberties in Canada. Celebrating excellence in legal advocacy, journalism, the arts and youth activism, the annual Liberty Awards bring together some of Canada's preeminent social justice champions.

## Meet our award winners

### Sheila Tucker- Excellence in Legal Advocacy (Individual)



Sheila Tucker is the recipient of the Excellence in Legal Advocacy – Individual Liberty Award. As the co-lead counsel on *Carter v. Canada*, Sheila Tucker secured a watershed victory from the B.C. Supreme Court where the court ruled that the right to die with dignity is protected by the Charter of Rights and Freedoms.

### McCarthy Tétrault – Excellence in Legal Advocacy (Firm)



McCarthy Tétrault has devoted many hundreds of hours to the work of the Association. In the last several years, many lawyers

at McCarthy's have represented the BCCLA pro bono at all levels of court.

### Brian Hutchinson- Excellence in Journalism



Brian's work on police accountability helped uncover the "Cowboy Mountie" who was involved in the 2003 death of Clayton Alvin Willey in Prince George, and his in-depth coverage of the more recent Missing Women Commission of Inquiry was unparalleled.

### Shane Koyczan – Excellence in the Arts



Shane Koyczan is an outstanding Canadian Poet, Author and Performer. Shane's work on bullying and anti-discrimination prompted his nomination. His incredible performance at the Liberty Awards Gala was one of the most memorable moments of the event.

### OpenMedia.ca – Excellence in Youth Activism



OpenMedia.ca is a grassroots organization that fights for the open Internet. The BCCLA's partnership in 2012 helped successfully oppose Bill C-30, putting an end to the Canadian government's online spying bill.



Steve Anderson, Reilly Yeo, Shea Sinnott of Open Media, BCCLA Executive Director Josh Paterson, Shane Koyczan, Lindsey Pinto of Open Media, Dr. David Suzuki, BCCLA President Lindsay Lyster and Sheila Tucker.



Dr. David Suzuki delivers the keynote address



BCCLA President Lindsay Lyster and Brian Hutchison



BCCLA Executive Director Josh Paterson

## Welcome to Jessi Halliday!

The BCCLA is pleased to welcome Jessi Halliday as our new Legal Administrative Assistant. Jessi joins the BCCLA after completing the Legal Administrative Assistant certificate program at Douglas College. Her professional background includes four years as a support worker for youths with mental disabilities.



Shane Koyczan performs



2013 Liberty Awards attendees



Event volunteers and BCCLA staff from left to right: Kelly Douglas, Jessica Simkin, Sally Chin, Chaerean Kim, Erin Pavan, BCCLA Caseworker Alyssa Stryker, BCCLA Director of Development Stefanie Ratjen, Laura Crestohl, BCCLA Membership and Outreach Coordinator Charlotte Kingston, Danielle VanderEnde, Sumra Mahmood, Menka Sull.



BCCLA Director Eric Wyness

More online: [www.bccla.org/2013-liberty-awards-gala/](http://www.bccla.org/2013-liberty-awards-gala/)



# Your Rights on Trial

The BCCLA is intervening in a variety of cases aimed at protecting rights and freedoms. Here are just some of the cases we're working on.

## SEARCH AND SEIZURE

### **R.v. Vu** / *Supreme Court of Canada*

This case concerns whether a warrant authorizing a search for documents in a residence also permits the search of personal computers and mobile phones found therein. At issue are the limits of the police authority to search pursuant to a valid warrant, and how computers and electronic devices should be considered when determining the scope of a lawful search. The case was heard on March 27, 2013.

The Association argued that the significant intrusion



into privacy occasioned by a computer search and the capacity for computers and similar electronic devices to hold nearly infinite amounts of highly personal and private data requires a revised approach to the traditional test for obtaining a lawful warrant. The BCCLA argued that: (1) the warrant must specifically authorize the seizure of computers; (2) there should be a two-step process,

whereby an initial warrant authorizes the seizure, but not the search of the computer, and a subsequent warrant authorizing the search should be subject to specific search protocols; (3) the police must satisfy the higher standard of "investigative necessity" before obtaining a warrant; and (4) the "plain view" doctrine be abridged or altogether rejected in this context.

The BCCLA is represented by **Gerald Chan** and **Nader Hasan** of Ruby Shiller Chan Hasan Barristers.

### **R.v. Mann** / *BC Court of Appeal*

This case is an appeal from a conviction for offences connected to a kidnapping and the dismissal of an application for the exclusion of evidence taken from Blackberry smartphones. Among the issues on appeal is a constitutional challenge to the scope of the common law power to search incident to arrest, particularly as it relates to warrantless searches of the contents of smartphones and other similar personal electronic devices obtained during a lawful arrest.

The case will be heard on September 9-10, 2013.

The BCCLA will argue that the common law power of search incident to arrest does not per se include either a whole-sale or a "cursory" search of the contents of a mobile device. There is a high expectation of privacy in mobile communications devices, and there should be no search of a mobile device without a warrant. The state interest in preserving evidence will be met by the seizure of

the device at the time of arrest, and any subsequent search of that device requires a warrant. Permitting a cursory search of a mobile device as a matter of course and without requiring a specific and pressing justification offers insufficient protection in respect of the very personal information that is retained on smartphones.

The BCCLA is represented by **Brent Olthuis** and **Eileen Patel** of Hunter Litigation Chambers.



## POLICE ACCOUNTABILITY

### Wood v. Schaeffer / Supreme Court of Canada

This case involves Ontario's Special Investigative Unit (SIU), the civilian agency responsible for conducting independent investigations into incidents involving the use of police force causing death or serious injury. At issue is whether police officers who are involved in incidents attracting the attention of the SIU are entitled to obtain legal assistance in the preparation

of duty notes regarding the incident, and if so, the nature of any such assistance.

The BCCLA argued that police officers have a duty to write independent notes and that those notes must be prepared immediately after the occurrence of an incident. This duty is central to the integrity of the criminal justice system and the public's confidence

in the police. An officer who witnesses a bank robbery does not seek legal advice before completing the notes his or her duty requires. The fact that an officer is under investigation should not change the normal practice.

The BCCLA is represented by **Andrew Nathanson** and **Gavin Cameron** of Fasken Martineau.

## PRISONERS' RIGHTS

### Diane Knopf, Warden of Mission Institution and Harold Massey, Warden of Kent Institution v. Gurkirpal Singh Khela / Supreme Court of Canada

This case concerns the critical role that provincial superior courts play in ensuring that prisoners have access to meaningful judicial review when their rights inside prison walls are violated. Among the issues on appeal is whether habeas corpus should be construed narrowly or broadly. The BCCLA will argue that a restrictive interpretation of the

scope of review available on an application for habeas corpus undermines its historic use in safeguarding the protection of the liberty of the subject, in ensuring that the rule of law applies within penitentiary walls, and in providing prisoners with meaningful, significant, and timely access to justice in order to protect their liberty rights. The BCCLA's

submissions will also bring to the Court's attention changes to corrections law and policy, highlighting that the remedy of habeas corpus is more important than ever.

The BCCLA is represented by **Michael Jackson** of the UBC Faculty of Law and **Joana Thackeray** of Heenan Blaikie LLP.

## TORTURE-TAINTED EVIDENCE

### Attorney General of Canada (Republic of France) v. Diab / Ontario Court of Appeal

This case involves the application of the Extradition Act where there is a legitimate concern that the extradited person will be prosecuted in a foreign jurisdiction based on evidence derived from torture. Mr. Diab is a Canadian-French dual national whose extradition is being sought by the Republic of France in

connection with the allegation that he is responsible for the bombing of a synagogue in Paris in 1980. The Association will make submissions on the balance to be struck between the twin purposes of Canada's extradition regime: (1) cooperation with extradition partners and upholding the principle of comity among states; and

(2) protection of Canadians from being exposed to unjust legal systems or proceedings, including proceedings in which there is a genuine concern that evidence tainted by torture may be used.

The BCCLA is represented by **Brendan Van Niejenhuis** and **Justin Safayeni** of Stockwoods LLP.

## BCCLA Announces Settlement of Solitary Confinement Lawsuit

In March of 2011, the BCCLA filed a lawsuit against the federal government on behalf of BobbyLee Worm, a 26 year-old Aboriginal woman from Saskatchewan who was held in solitary confinement for more than three and a half years while in federal prison. We announced the settlement of that lawsuit in May of this year.

In the two years between the filing of the lawsuit and its settlement, the BCCLA made real progress in addressing the serious concerns raised by the use of long-term solitary confinement.

BobbyLee Worm was just 19 years-old and a first time offender when she entered prison. She experienced severe trauma and abuse during her childhood. Many of her family members had survived residential schools. She suffered extreme physical, emotional and sexual abuse throughout her childhood and adolescence. She was introduced to drugs by peers and was addicted at an early age.

In prison, officials placed BobbyLee on the “Management Protocol”, a program for high-risk women prisoners that allowed prison officials to isolate inmates in solitary confinement for months and years at a time. The vast majority of the women placed on the program were Aboriginal. Women were required to earn their way out of solitary confinement and could be returned to it for virtually any reason, including negative “emotional” behaviour, such as swearing or being disrespectful to staff.

It is difficult to imagine the conditions that BobbyLee endured while in prison. During her three and a half years in solitary confinement, she would spend up to 23 hours a day in a cell just 10 by 8 feet in size. Often the only human contact she had was through the food slot in the door of her cell. She told staff at the BCCLA that she would sometimes count the bricks on the wall of her cell to stop herself from going mad. The BCCLA filed the lawsuit on Ms. Worm’s behalf alleging that she was treated illegally and inhumanely.

Just two days after her lawsuit was filed, prison officials released Ms. Worm from “Management Protocol”. Later that same month, the Correctional Services of Canada announced that it would end its use of the program across Canada.

The government reached a settlement with BobbyLee in May of 2013. While the terms of the government’s release do not allow BobbyLee to disclose the terms of the settlement, she has told the BCCLA that she is pleased with the outcome of the process and with the settlement.

While BobbyLee’s lawsuit drew attention to the unconstitutional practice of long-term solitary confinement and helped to end the “Management Protocol” program, there is still work to be done to end the use of prolonged solitary confinement for all inmates in Canada. The BCCLA is committed to continuing to challenge the government’s use of this illegal practice.

Ms. Worm was represented by the BC Civil Liberties Association and the cooperating law firm of Janes Freedman Kyle Law Corporation.



Litigation Director Grace Pastine, Counsel Robert Janes and plaintiff, BobbyLee Worm

*continued from page 2*

*to note that this is a private institution that is exempted, in part, from the British Columbia human rights legislation and to which the Charter does not apply. To state that the voluntary adoption of a code of conduct based on a person's own religious beliefs, in a private institution, is sufficient to engage s. 15 would be inconsistent with freedom of conscience and religion, which co-exist with the right to equality.*

The freedom to join together with those we want to join with, on the terms we choose, is vital, especially for equality-seeking groups. That freedom is essential to the ability of the marginalized, the powerless, and the vulnerable to act collectively to challenge unjust laws, practices and institutions.

Gay, lesbian, bisexual, trans and queer people know a lot about violations of their freedom to associate, even in their most intimate relationships. Police raids on gay bars, criminalization of same sex sexual behavior, stigmatization of gays and lesbians on the basis of their association with others, the denial of marriage equality – all these can be seen as violations of the freedom to associate. Overcoming these injustices has been fundamental to achieving equality for GLBTQ people.

To answer the questions posed by our doubters, yes, the

BCCLA believes in equality, and queer history shows that you cannot have equality without freedom of association.

And to be clear, it is not that we support TWU or its application to have an accredited Law School; it is that we support the fundamental freedoms of its faculty and students. We cannot pick and choose only those whose beliefs we agree with when it comes to protecting freedom of belief and association. If we want freedom of belief and association for ourselves, we must uphold it for all.

Are there no limits to the freedom to believe and to associate in accordance with those beliefs?

Of course there are – one's freedom ends where harm to another begins. The Supreme Court in its TWU decision, said this:

*... the proper place to draw the line in cases like the one at bar is generally between belief and conduct. The freedom to hold beliefs is broader than the freedom to act on them. Absent concrete evidence that training teachers at TWU fosters discrimination in the public schools of B.C., the freedom of individuals to adhere to certain religious beliefs while at TWU should be respected. The BCCT, rightfully, does not require public universities with teacher education programs to screen out applicants who hold sexist,*

*racist or homophobic beliefs. For better or for worse, tolerance of divergent beliefs is a hallmark of a democratic society. Acting on those beliefs, however, is a very different matter... Discriminatory conduct by a public school teacher when on duty should always be subject to disciplinary proceedings.*

In the same way, if a graduate of a TWU Law School were to engage in discriminatory conduct, then they should be subject to disciplinary proceedings by the Law Society. If there was evidence of a pattern of discriminatory conduct by such graduates, then that would be reason to rethink the Law School's accreditation. But in the absence of such evidence, students and faculty who wish to attend a private, faith-based Law School, and to voluntarily agree to abide by a Covenant circumscribing their behavior while they do so, should be free to make that choice.

Civil libertarians, by their nature, and by the nature of the issues we care about, will not always agree with one another about everything. It would be shocking if they did! I hope that those of our members and supporters who may disagree with the BCCLA's position on this matter can continue to work together with us to promote civil liberties and human rights for all Canadians.

## BORDER SECURITY IS NOT FOR TV

Travelling often means crossing borders. But crossing borders doesn't mean that you consent to being filmed for reality TV.

The BCCLA believes it is an infringement of privacy rights for the government or its partners to film and to use or disclose personal images or any information for the purposes of entertainment or "public information", or to make any kind of television show or other broadcast.

The BCCLA is helping empower travellers by launching an online form for travellers to refuse or revoke their consent to being filmed

for reality TV. The online form allows individuals who have crossed the border or who plan to travel outside of Canada to legally refuse permission to



be filmed by the CBSA or its private film crew partners.

In under a month, more than 1400 people submitted their

forms- refusing to consent to be filmed at Canada's border crossings. On June 24, 2013, we submitted these forms to Canada Border Services Agency (CBSA), Force Four Entertainment, Shaw Media, National Geographic, and BST Media—sending a clear message to government and its private partners that it is not ok to violate peoples' privacy rights.

The BC Civil Liberties Association has partnered on this initiative with the Cancel Border Security Campaign. To submit your own refusal to consent form, or take part in the campaign, visit [www.bccla.org/notfortv](http://www.bccla.org/notfortv).

Freedom means different things to us all, but we all deserve it equally.

Your contributions make our work possible. Become a member by visiting [www.bccla.org](http://www.bccla.org).



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