

Canada

	2018	2019	2020
Internet Freedom Status	Free	Free	Free
A. Obstacles to Access (0-25pts)	23	23	23
B. Limits on Content (0-35pts)	31	33	32
C. Violations of User Rights (0-40pts)	31	31	32
TOTAL* (0-100)	85	87	87

*100=most free, 0=least free

**A total score of 100-70=Free, 69-40=Partly Free, 39-0=Not Free

Overview

[TO BE UPDATED IN FINAL DRAFT]

Canada's reputation as one of the world's most free online environments was further solidified during the coverage period by effective digital mobilization and a decrease in copyright-related content removals due to amendments to the Copyright Act. Internet access is reliable and affordable for a majority of the population, although rural areas are underserved by infrastructure and telecommunications services. Users in Canada enjoy strong protections for free expression and press freedom.

Canada has a strong history of respect for political rights and civil liberties, though recent years have seen concerns about the scope of government surveillance laws.

Key Developments, June 1, 2019 - May 31, 2020

- [TO BE UPDATED IN FINAL DRAFT]

A. Obstacles to Access

There are very few infrastructural or regulatory obstacles to internet access in Canada. In a landmark policy decision released in 2016, the telecommunications regulator declared that high-speed internet should be a "basic telecommunications service" that all Canadians receive. Internet and mobile phone penetration rates continue to increase, although there are still geographic disparities related to access, reliability, speed, quality, and cost that particularly affect more rural and remote areas.

	2018	2019	2020
A1: Do infrastructural limitations restrict access to the internet or the speed and quality of internet connections? (0–6 points)	6	6	6

Both fixed-line and mobile internet penetration rates have remained relatively steady in Canada. Mobile service providers continued to deploy a number of newer technologies to provide mobile broadband service, including Evolved High Speed Packet Access (HSPA+) and LTE, yet penetration rates for new technologies are steady, as Canada is close to its saturation point. However, small increases in LTE access have occurred in remote regions.

Broadband service of at least 5 Mbps is available to approximately 98% percent of households through a variety of technologies including fixed and wireless, according to the Canadian Radio-television and Telecommunications Commission (CRTC).¹ Access to higher speeds continues to increase across Canada.² Canada fell short of reaching its lofty goal of 100 percent of households with internet connectivity and broadband speeds of at least 5 Mbps by the end of 2016.³ In 2019, the CRTC shifted its focus to "high-quality" internet service,

¹ Canadian Radio-television and Telecommunications Commission, "Communications Monitoring Report 2019," January 2020, <https://crtc.gc.ca/eng/publications/reports/policymonitoring/2019/index.htm>. Statistics taken from "Retail Fixed Internet and Broadband Sector" section, table 9.2, direct link at <https://crtc.gc.ca/eng/publications/reports/policymonitoring/2019/cmr9.htm>.

² *Ibid*, see figure 9.22.

³ Canadian Radio-television and Telecommunications Commission, "Report on Plans and Priorities for 2016-2017," March 2016, <https://crtc.gc.ca/eng/publications/reports/policymonitoring/2018/index.htm>; Canadian Radio-television and Telecommunications Commission, "Departmental

defined as 50 Mbps download, 10 Mbps upload and unlimited data transfers, with the goal of 90% household availability of this service by 2021, and 100% by 2031.⁴

In a landmark policy decision released in 2016,⁵ the CRTC recognized the importance of ultra-high-speed (50 Mbps download speeds and above) internet access for the future of the economy. In the policy, the CRTC set a universal access goal for all residential and business fixed-line customers to have access to download speeds of at least 50 Mbps with unlimited data. Furthermore, it declared that high-speed internet access is a “basic telecommunications service” and established a C\$750 million (US\$565 million) fund to reach its targets.⁶ More than two years later, in September 2018, the CRTC finally announced criteria for spending the fund’s money.⁷ As of this reporting period, the CRTC has yet to spend the funds, and opened a second round of calls for applications for the project in November 2019.⁸

	2018	2019	2020
A2: Is access to the internet prohibitively expensive or beyond the reach of certain segments of the population for geographical, social, or other reasons? (0–3 points)	2	2	2

Internet access is not prohibitively expensive or beyond the reach of most segments of the population, although a digital divide in terms of geography persists, and poorer people struggle to afford access. In October 2019, Canada unveiled a Digital Charter naming universal access as the first of ten draft principles for a digitally connected Canada.⁹

Mobile broadband data remains expensive compared to fixed-line access. High-speed, fixed-line internet access remains affordable due to robust competition; prices became even more competitive in 2016 when the CRTC, an independent public regulator, reduced the price of wholesale high-speed internet access.¹⁰

Perhaps the most important obstacle to availability and ease of access is geography. Canada is overwhelmingly urban, with 81 percent of the population living in urban areas.¹¹ Furthermore, approximately 75 percent of the population lives within 160 kilometers of the border with the United States.¹² While providing “reliable and affordable telecommunications services of high quality” to rural areas is enshrined in the law,¹³ affordable high-speed internet service is less available in more isolated areas, especially in the vast northern territories.

High-speed internet access is also more expensive in rural areas than in cities and rural customers have fewer choices of ISPs according to the CRTC’s 2019 figures.¹⁴ The major internet service providers (ISPs) generally offer services that have caps on bandwidth, which results in increased fees for users who exceed the limit. Such limits are much more restrictive for wireless connectivity than for wired connectivity, which further exacerbates the urban-rural divide in terms of cost.

According to the CRTC’s 2018 Communications Monitoring Report, household broadband service with speeds

Plan 2017-2018,” March 2017, <https://crtc.gc.ca/eng/publications/reports/policymonitoring/2018/index.htm> (replacing the title “Report on Plans and Priorities” of the previous years).

⁴ Canadian Radio-television and Telecommunications Commission, “Departmental Plan 2019-2020,” April 2019, <https://crtc.gc.ca/eng/publications/reports/dp2019/dp2019.htm>.

⁵ CRTC Telecom Regulatory Policy 2016-496, “Modern telecommunications services – The path forward for Canada’s digital economy,” December 21, 2016, https://crtc.gc.ca/eng/archive/2016/2016-496.htm?_ga=1.48897774.955238529.1485262644.

⁶ “CRTC establishes fund to attain new high-speed Internet targets,” Government of Canada News Release, December 21, 2016, <https://www.canada.ca/en/radio-television-telecommunications/news/2016/12/crtc-establishes-fund-attain-new-high-speed-internet-targets.html>.

⁷ Emily Jackson, “CRTC reveals criteria for \$750M broadband fund for rural internet access,” *The National Post*, September 27, 2018, <https://business.financialpost.com/telecom/crtc-reveals-criteria-for-750m-broadband-fund-for-rural-internet-access>.

⁸ CRTC Telecom Notice of Consultation CRTC 2019-372-2, April 27, 2020, <https://crtc.gc.ca/eng/archive/2019/2019-372-2.htm>.

⁹ “Canada’s Digital Charter in Action: A Plan by Canadians, for Canadians,” Innovation, Science and Economic Development Canada, October 23, 2019, https://www.ic.gc.ca/eic/site/062.nsf/eng/h_00109.html.

¹⁰ Canadian Radio-television and Telecommunications Commission, Telecom Order CRTC 2016-396, October 6, 2016, <https://crtc.gc.ca/eng/archive/2016/2016-396.htm>.

¹¹ From the 2011 census. See Statistics Canada data at <https://www12.statcan.gc.ca/census-recensement/index-eng.cfm>, accessed March 20, 2017.

¹² National Geographic “Canada Facts,” accessed March 20, 2017, <https://web.archive.org/web/20170606011821/http://travel.nationalgeographic.com/travel/countries/canada-facts/>.

¹³ See the *Telecommunications Act*, S.C. 1993, c.38, section 7(b), <https://laws-lois.justice.gc.ca/eng/acts/T-3.4/FullText.html>.

¹⁴ Canadian Radio-television and Telecommunications Commission, “Communications Monitoring Report 2019,” January 2020, section 2 “2018 Communications Services Pricing in Canada,” subsection iv. Internet Services, direct link <https://crtc.gc.ca/eng/publications/reports/policymonitoring/2019/cmrv2.htm#a4>.

between 5 Mbps and 9.99 Mbps was available in 100 percent of urban areas, compared to 98 percent in rural areas (a small increase from 97 percent penetration in rural areas the previous year). However, the 98 percent figure includes 10 percent of households where availability was only via wireless services (HSPA+ and LTE), which are generally more expensive, especially as data usage rates increase. With regard to the CRTC's focus on high-quality service, the urban-rural divide is significantly more pronounced: 50 Mbps service is available to 97.7% of urban households but only 40.8% of rural households.¹⁵

The government has taken a patchwork approach to improving connectivity in remote communities, indicating a lack of a strong overall strategy. The 2018 government budget identified new technologies, specifically low-Earth orbit (LEO satellites), to enhance rural connectivity.¹⁶ While the plan was short on specifics, it pledged C\$100 million (US\$75 million) over five years for research and development. The 2019 budget took a new proactive approach, recognizing that 50 Mbps high-quality service is a necessity, and pledging \$5 to \$6 billion in investments over the next 10 years for improved rural broadband service.¹⁷ Uncertainty surrounds the 2020 budget priorities following the formation of a new Liberal government in October 2019 and in light of the COVID-19 pandemic.¹⁸

The COVID-19 pandemic has shed light on this continuing urban-rural disparity as work, school, and political affairs shift online.¹⁹ Recent reports indicate that the government may accelerate the broadband access plan, particularly in rural areas, as part of Canada's pandemic response.²⁰

There is also a considerable gap in access in terms of income: as of 2012, the penetration rate for home internet access for the highest income quartile was nearly 98 percent, while the penetration rate for the lowest income quartile was only 58 percent.²¹ Internet connections are widely available in public spaces such as cafés, shopping malls, and libraries, generally free of charge. There is a wide range of content available in both official languages (English and French) as well as many other languages.

	2018	2019	2020
A3: Does the government exercise technical or legal control over internet infrastructure for the purposes of restricting connectivity? (0–6 points)	6	6	6

The government does not exercise technical or legal control over the internet infrastructure for censorship. Authorities do not restrict access to any social media platforms or communications apps.

The government has not centralized the telecommunications infrastructure. However, given the vertical integration of the marketplace, the infrastructure is controlled by a small number of companies, which in theory could facilitate greater control of content and the implementation of surveillance technologies. In October 2018, the CRTC rejected a proposal to limit access to websites on the basis of copyright infringement (see B1), which would have been easily implemented considering the small number of ISPs in Canada.

	2018	2019	2020
A4: Are there legal, regulatory, or economic obstacles that restrict the diversity of service providers? (0–6 points)	5	5	5

¹⁵ Supra note 1, infographic 9.9.

¹⁶ "Quality + Growth = A Strong Middle Class," The Honourable William Francis Morneau, February 27, 2018, <https://www.budget.gc.ca/2018/home-accueil-en.html>. Refer to PDF version at <https://www.budget.gc.ca/2018/docs/plan/budget-2018-en.pdf>, page 120.

¹⁷ Government of Canada (The Honourable William Francis Morneau, Finance Minister), "Budget 2019 – Investing in the Middle Class", March 19, 2019, full document (PDF) at <https://www.budget.gc.ca/2019/docs/plan/budget-2019-en.pdf>; figures from Chapter 2, Part 3 "Connecting Canadians" available at <https://www.budget.gc.ca/2019/docs/plan/chap-02-en.html#Access-to-High-Speed-Internet-for-All-Canadians>.

¹⁸ "Federal budget delayed as House of Commons shuts down for five weeks", Canadian Press, March 13, 2020, <https://www.advisor.ca/news/economic/federal-budget-delayed-as-house-of-commons-shuts-down-for-five-weeks/>.

¹⁹ Andrea Lupton, "In the time of COVID-19, slow Internet is more than an annoyance," CBC News, March 27, 2020, <https://www.cbc.ca/news/canada/london/internet-rural-covid19-1.5512235>.

²⁰ Catharine Tunney, "Liberals hasten high-speed broadband access plan in response to pandemic," CBC News, May 2, 2020, .

²¹ Statistics Canada, "Household access to the Internet at home, by household income quartile and geography," Table 22-10-0007-01, accessed April 11, 2020, <https://www150.statcan.gc.ca/t1/tbl1/en/cv.action?pid=2210000701>. Data is from 2012, the most recent available.

There are some legal and economic obstacles that restrict the diversity of service providers, although the market remains relatively open. Specifically, the legal requirements for Canadian ownership of service providers, combined with the high costs of entry and infrastructure, has led to market concentration, especially for mobile service.

To operate as a Canadian telecommunications provider, a company must meet the requirements in Section 16 of the Telecommunications Act. In 2018 (the most recent available data), Canadian retail telecommunications revenues (comprised of wireline, wireless, internet, and data and private lines) totaled C\$53.1 billion (US\$38.3 billion), a 5.5 percent increase from the previous year. The five largest companies (Bell, Québecor, Rogers, Shaw, and TELUS) accounted for 87.4 percent of total revenues, a very minor increase from the previous year. The market share of the five companies has remained relatively steady in recent years.²²

The growth in the market for internet service outpaces that of the ICT market generally. According to the CRTC's 2019 Communications Monitoring Report, the revenues for the fixed retail internet services sector were C\$11.8 billion (US\$8.45 billion) in 2018, an increase of 7.3 percent over 2017, while mobile revenues (voice and data) rose 10.7 percent from the previous year.²³

Canadians have a choice of wireless internet providers, all of which are privately owned. There are at least three providers to choose from in all markets, although providers vary region to region, and some providers are restricted to urban areas. Restrictions on foreign investment impose some limits, though a few foreign companies have entered the marketplace in recent years. The provision of access services is subject to regulation, with rules on tower sharing, domestic roaming agreements, and a consumer regulator to address consumer concerns.

For wireless service, three companies dominate the market: Bell, Telus, and Rogers have 90.7 percent of wireless subscribers.²⁴ This share has remained relatively steady over the years. These companies are also leaders in the provision of wired internet service (via phone lines or cable), along with Shaw, Cogeco, and Vidéotron (owned by Québecor). While Canadians generally enjoy a choice of wired internet providers, the available choices vary from region to region, and often there is only one choice per technology type, leading to a public perception that options are limited and prices are kept artificially high. This perception is not without merit as it pertains to wireless data, as a 2018 report determined that Canada's wireless data prices were among the highest in the world.²⁵ Though prices are finally falling thanks to certain moves from the federal government such as opening up the wireless spectrum leading to greater competition, they remain among the highest in the world.²⁶

	2018	2019	2020
A5: Do national regulatory bodies that oversee service providers and digital technology fail to operate in a free, fair, and independent manner? (0–4 points)	4	4	4

The CRTC, the regulatory body that oversees the communications industry, operates largely independent from the government. The government appoints the CRTC chairperson and commissioners without public consultation, but they are not subject to political pressure. In some cases, the government has provided guidance on policy expectations regarding telecommunications regulations, but its input is nonbinding. Moreover, CRTC decisions can be appealed to the courts, or a government review can be requested. The government has rarely overturned CRTC decisions.

The CRTC's regulatory powers extend to internet access, but not to internet content, a principle known as the new media exemption. The CRTC's position to not regulate internet content dates to 1999 and has been reinforced on

²² Canadian Radio-television and Telecommunications Commission, "Communications Monitoring Report 2019," *Telecommunications Overview* section at <https://crtc.gc.ca/eng/publications/reports/policymonitoring/2019/cmr8.htm>.

²³ *Ibid*, infographic 8.6.

²⁴ Canadian Radio-television and Telecommunications Commission, "Communications Monitoring Report 2019," *Retail Mobile Sector* section at <https://crtc.gc.ca/eng/publications/reports/policymonitoring/2019/cmr10.htm>, infographic 10.2.

²⁵ Michael Geist, "World's Worst Wireless Pricing?: Report Finds Canadian Wireless Broadband Pricing Offers Least Bang for the Buck in Developed World," May 4, 2018, <http://www.michaelgeist.ca/2018/05/worldsworstpricing/>

²⁶ Michael Lewis, "Canadian wireless prices are finally declining — but they're still among the highest in the world," *Toronto Star*, December 31, 2019, <https://www.thestar.com/business/2019/12/31/canadian-wireless-prices-are-finally-declining-but-theyre-still-among-the-highest-in-the-world.html>.

numerous occasions since then,²⁷ including by the SCC.²⁸ This contrasts with other industries, specifically television, where the CRTC exerts some control over content, most notably by requiring broadcasters to air a minimum amount of Canadian content. During the coverage period, the government recommended granting the CRTC additional powers to regulate Canadian content online (see B6).

B. Limits on Content

The government does not generally block websites or filter online content, although a court can order the removal of illegal content. In a positive development during the previous coverage period, the government amended the notice-and-notice regime under the Copyright Act, placing significant restrictions on what can be included in copyright infringement notices sent to users. During this coverage period, a Canadian court ordered ISPs to block websites involved in illegally distributing copyrighted content for the first time ever.

	2018	2019	2020
B1: Does the state block or filter, or compel service providers to block or filter, internet content? (0–6 points)	6	6	5

The government does not generally block or filter online content or require service providers to do so. Project Cleanfeed Canada allows ISPs to block child sexual abuse imagery hosted outside of Canada, restrictions that are permissible under international human rights standards (see B3).

In January 2018, a group of more than 25 ISPs, media companies, creative companies, and other interested parties—including major players such as Bell, Rogers, and the Canadian Broadcasting Corporation (CBC)—banded together as “FairPlay Canada”²⁹ to petition the CRTC to establish an independent body that would recommend blocking access to “websites and services that are blatantly, overwhelmingly, or structurally engaged in piracy.”³⁰ Some commentators criticized the plan for possibly violating Canada’s net neutrality regime and for the potential that sites not engaged in piracy would be affected.³¹ Other commentators insisted it was a necessary tool to fight online piracy and protect copyright.³² Ultimately, the CRTC rejected the proposal in October 2018 after determining that it lacked jurisdiction to implement the plan. However, the commission invited Parliament to examine the issue.³³

In November 2019, a court ordered all of Canada’s major ISPs to block several domains associated with a service that sold copyright-infringing programming. Several large media companies had petitioned the Federal Court in *Bell Media Inc. v. GoldTV.Biz*³⁴ to order blocking of the domains, which were rebroadcasting their programming without permission. The Court, holding that the plaintiffs would suffer irreparable harm, granted an injunction ordering ISPs to block their users’ access to the websites via DNS blocking and IP address blocking.

	2018	2019	2020
B2: Do state or nonstate actors employ legal, administrative, or other means to force publishers, content hosts, or digital platforms to delete content? (0–4 points)	2	3	3

Nonstate actors, specifically large media companies, have used legal means to force digital platforms to delete content, generally for copyright infringements. However, a significant development in 2018 should reduce the misuse of the notice-and-notice regime under the Copyright Act.

²⁷ See most recently *Broadcasting Regulatory Policy CRTC 2015-355 and Broadcasting Order CRTC 2015-356*, August 6, 2015, <https://crtc.gc.ca/eng/archive/2015/2015-355.htm>.

²⁸ Reference re Broadcasting Act, 2012 SCC 4, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/7989/index.do>

²⁹ See FairPlay Canada home page at <https://www.fairplaycanada.com/>.

³⁰ FairPlay Canada, *Application pursuant to sections 24, 24.1, 36, and 70(1)(a) of the telecommunications act, 1993 to disable on-line access to piracy sites*, January 29, 2018, PDF available at https://assets.corusent.com/wp-content/uploads/2018/02/FairPlay_Canada_CRTC_Report_2018.pdf.

³¹ See e.g. Michael Geist’s nine-part series, “The Case Against the Bell Coalition’s Website Blocking Plan,” February 2018, part 1 available at <http://www.michaelgeist.ca/2018/02/case-bell-coalitions-website-blocking-plan-part-1-canadas-current-copyright-law-provides-effective-anti-piracy-tools/>

³² See e.g. Barry Sookman, “Why the CRTC should endorse FairPlay’s website-blocking plan: a reply to Michael Geist,” February 12, 2018, <http://www.barrysookman.com/2018/02/12/why-the-crtc-should-endorse-fairplays-website-blocking-plan-a-reply-to-michael-geist/>

³³ CRTC news release, “CRTC denies FairPlay Canada’s application on piracy websites on jurisdictional grounds,” October 2, 2018, <https://www.canada.ca/en/radio-television-telecommunications/news/2018/10/crtc-denies-fairplay-canadas-application-on-piracy-websites-on-jurisdictional-grounds.html>. See also CRTC Telecom Decision CRTC 2018-384, <https://crtc.gc.ca/eng/archive/2018/2018-384.htm>

³⁴ 2019 FC 1432, November 15, 2019, <https://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/424753/index.do>.

The previous notice-and-notice program required ISPs to forward notices from copyright holders claiming infringement to the alleged copyright violator (see B3). Several US-based antipiracy firms, including Rightscorp and CEG-TEK, used the system to send notifications to subscribers that misstated Canadian copyright law, citing US awards for damages and threatening the termination of internet access. The notifications sowed fear among Canadians, and many paid the settlement fees proposed in the notices.³⁵ In December 2018, Parliament passed amendments to the program to restrict the information that can be included in the notices, no longer allowing misstatements of Canadian law. Further, ISPs are no longer required to forward notices to subscribers if they contain an offer to settle the infringement claim, a request or demand for payment or personal information, or a link to such offers or demands.³⁶

Media companies have continued to use the courts to shut down and penalize operators of websites and other online services that redistribute their content in violation of copyright laws, or that offer services facilitating such activities. In 2017, the Federal Court of Appeal upheld a lower court decision granting an injunction to shut down websites selling copyright-infringing set-top boxes.³⁷ During the coverage period, a group of media companies sought and obtained an order to force ISPs to block certain websites that hosted copyright-infringing content (see B1).

In 2017, the SCC upheld the decision by the British Columbia Court of Appeals in Google Inc. v. Equustek Solutions Inc.,³⁸ ordering Google to remove links from its global index to websites that infringed on the plaintiffs' trademark (see B3).

Defamation claims may also result in content removals, as content hosts fear potential liability as publishers of the defamatory content. Defamation claims may also prevent the posting of content, as the British Columbia Court of Appeal demonstrated in March 2018 when it ordered a defendant to not post anything about the plaintiff, as well as awarding damages.³⁹ In June 2018, the SCC ruled that a case involving the publication of defamatory content on an Israeli website against a Canadian resident should be heard in Israel rather than Canada, despite the fact that damages were incurred in Canada.⁴⁰

In March 2020, the Law Commission of Ontario (Canada's largest province) proposed a new *Defamation Act* that would require internet platforms to remove defamatory content upon notification.⁴¹ There were other significant developments regarding defamation during the reporting period (see C2).

In Quebec, Canada's French-speaking province, websites that are commercial in nature are legally required to be in French,⁴² although they can also be in other languages. Violators may receive a warning from a government agency, and are then subject to fines, if they do not comply. Some website operators may choose to take down their websites rather than pay for translation or face fines. National or international operators of websites that do business in Quebec (and would therefore be subject to the law) sometimes block Quebec residents' access to their websites rather than comply.⁴³

³⁵ Jeremy Malcolm, "Canada Must Fix Rightsholder Abuse of its Copyright Notice System," *Deeplinks Blog*, Electronic Frontier Foundation, April 23, 2015, <https://www.eff.org/deeplinks/2015/04/call-canada-fix-rightsholder-abuse-its-copyright-notice-system>

³⁶ Bill C-86, Budget Implementation Act, 2018, No. 2, amending the *Copyright Act*, assented to December 13, 2018, available at <https://www.parl.ca/LegisInfo/BillDetails.aspx?Language=E&billId=10127729>.

³⁷ Wesley dba MTLFREETV.com v Bell Canada et al, FCA 55, March 30, 2017, <https://decisions.fca-caf.gc.ca/fca-caf/decisions/en/item/229063/index.do>.

³⁸ Google Inc. v. Equustek Solutions Inc., 2017 SCC 34, case number 36602, June 28, 2017, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/16701/index.do>

³⁹ Nazerali v. Mitchell, 2018 BCCA 104, March 19, 2018, <https://www.canlii.org/en/bc/bcca/doc/2018/2018bcca104/2018bcca104.html>

⁴⁰ Haaretz.com, et al. v. Mitchell Goldhar, SCC case information at <https://www.scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=37202>, leave to appeal from the decision of the Court of Appeal for Ontario, 2016 ONCA 515, <https://www.canlii.org/en/on/ontca/doc/2016/2016onca515/2016onca515.html?autocompleteStr=haaretz&autocompletePos=2>.

⁴¹ Law Commission of Ontario, *Defamation Law in the Internet Age*, March 2020, <https://www.lco-cdo.org/en/our-current-projects/defamation-law-in-the-internet-age/>.

⁴² See the *Charter of the French Language*, c. C-11, article 52, <http://legisquebec.gouv.qc.ca/en>ShowDoc/cs/C-11>.

⁴³ Elysia Bryan-Baynes, "Quebec language police target English retail websites," November 13, 2014, <https://globalnews.ca/news/1671128/oqlf-targets-english-retail-websites/>.

	2018	2019	2020
B3: Do restrictions on the internet and digital content lack transparency, proportionality to the stated aims, or an independent appeals process (0–4 points)	4	4	4

Restrictions on the internet are generally fair and proportionate.

Canada's largest ISPs participate in Project Cleanfeed Canada, an initiative that allows ISPs to block access to child sexual abuse images that are hosted outside the country (as opposed to content hosted within Canada, which is subject to removal).⁴⁴ Accessing child pornography is illegal in Canada under section 163.1(4.1) of the Criminal Code,⁴⁵ as well as under international human rights standards. The initiative targets international sites that the Canadian government does not have the jurisdiction to shut down.

Bill 74, Quebec's controversial law requiring ISPs to block access to gambling sites, came into effect in 2016,⁴⁶ but remains inoperative. In July 2018, a Quebec court declared the law unconstitutional, ruling online gambling a federal rather than provincial matter.⁴⁷

In 2004, the SCC ruled that ISPs are not liable for copyright infringement violations committed by their subscribers,⁴⁸ a principle now enshrined in law.⁴⁹ Copyright law includes a notice-and-notice provision in effect since 2015, which was amended during the coverage period (see B2). Unlike a notice-and-takedown system, the program does not make intermediaries legally liable for removing content upon notification by the copyright owner. Rather, copyright owners are permitted to send notifications alleging infringement to ISPs. The ISPs are then required to forward the notifications to the implicated subscriber. Any further legal action is the responsibility of the copyright owner, and it is incumbent upon the person who uploaded the infringing content to remove it following a legal decision. No content is removed from the internet without a court order. Content may be ordered blocked at the ISP level by a court, and ISPs do not disclose subscriber information without court approval, although approvals are more common in recent years.⁵⁰

In November 2019, a court ordered Canada's major ISPs to block several domains associated for copyright infringement (see B1). Legal experts criticized the decision on numerous grounds: for example, as an overreach by the Court in an area best to Parliament or the CRTC,⁵¹ and that the Court relied too heavily on a British decision within a very different legal framework.⁵² TekSavvy, the only ISP to contest the original decision, has appealed based upon numerous factors, including it being a violation of Canadians' freedom of speech.⁵³

In the SCC's ruling in Google Inc. v. Equustek Solutions Inc., the court's reasoning was strictly focused on the law of intellectual property and interlocutory injunctions, so it is unclear if such worldwide orders may be granted in other areas of law in the future. It is also unclear whether such worldwide orders can have effect in foreign jurisdictions. For example, a US court has questioned whether Canadian courts have jurisdiction to make such an order and has already granted a preliminary injunction against the implementation of the Equustek decision in the US based on the long-standing principle of Google as an intermediary.⁵⁴ In April 2018, Google took the US

⁴⁴ Cybertip!ca, "Cleanfeed Canada," <https://www.cybertip.ca/app/en/projects-cleanfeed#projects-cleanfeed>

⁴⁵ Criminal Code, RSC 1985 c C-46 s 163.1(4.1).

⁴⁶ Michael Geist, "Government-Mandated Website Blocking Comes to Canada as Quebec's Bill 74 Takes Effect," May 26, 2016, <http://www.michaelgeist.ca/2016/05/bill74takeseffect/>

⁴⁷ Association canadienne des télécommunications sans fil c. Procureure générale du Québec, 2018 QCCS 3159 (CanLII), <https://www.canlii.org/fr/qc/qccs/doc/2018/2018qccs3159/2018qccs3159.html?searchUrlHash=AAAAAQATcHJvamVOIGRIIGxhIGxvaSA3NAAAAAB&resultIndex=26>.

⁴⁸ Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn of Internet Providers, [2004] SCC, 2 SCR 427.

⁴⁹ Copyright Act, R.S.C., 1985, c. C-42, section 31.1, <https://laws-lois.justice.gc.ca/eng/acts/c-42/FullText.html>.

⁵⁰ See e.g. *Voltage Pictures, LLC v. John Doe*, 2016 FC 881 (CanLII), at <https://www.canlii.org/en/ca/fct/doc/2016/2016fc881/2016fc881.html>, where the Federal Court ordered an ISP to divulge subscriber information of a representative defendant in a so-called "reverse class action" copyright infringement lawsuit. During the coverage period, the SCC denied certification for the underlying class action lawsuit in *Voltage Pictures, LLC Canada v. Salna*, 2019 FC 1412, <https://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/458741/index.do>.

⁵¹ Michael Geist, "Fool's Gold: Why a Federal Court Judge Was Wrong To Issue a Website Blocking Order Against GoldTV," November 19, 2019, <http://www.michaelgeist.ca/2019/11/fools-gold-why-a-federal-court-judge-was-wrong-to-issue-a-website-blocking-order-against-goldtv/>.

⁵² Allen Mendelsohn (this report's author), "Site blocking! Reverse class actions! It's the internet and copyright law jurisprudence last two weeks in review," November 25, 2019, <http://allenmendelsohn.com/2019/11/site-blocking-reverse-class-actions-its-the-internet-and-copyright-law-jurisprudence-last-two-weeks-in-review/>.

⁵³ Aisha Malik, "TekSavvy appeals Federal Court decision ordering ISPs to block GoldTV," November 26, 2019, <https://mobilesyrup.com/2019/11/26/teksavvy-appeals-federal-court-decision-ordering-isps-block-goldtv/>.

⁵⁴ Google Inc. v. Equustek Solutions Inc., United States District Court, N.D. California, San Jose Division, Docket No. 5:17-cv-04207-EJD, November 2, 2017, <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?referer=https://www.google.ca/&httpsredir=1&article=2589&context=historical>

judgment back to the British Columbia court that made the original ruling and asked for the injunction to be suspended, but the court denied Google's application.⁵⁵

Although platforms are legally protected from liability for copyright infringement by their users, they may face liability for alleged defamation once alerted to the publication. A court may also order the removal of the content. The SCC has held that merely linking to defamatory content on the internet is not defamation in and of itself; it would only be defamation if a site actually repeats the defamatory content. Therefore, the links would not be removed.⁵⁶

	2018	2019	2020
B4: Do online journalists, commentators, and ordinary users practice self-censorship? (0–4 points)	3	3	3

Online self-censorship is not widespread. However, certain individuals may self-censor for fear of potential government surveillance under Bill C-51 (see C5).

	2018	2019	2020
B5: Are online sources of information controlled or manipulated by the government or other powerful actors to advance a particular political interest? (0–4 points)	4	4	4

Online sources of information are not widely controlled or manipulated by the government or other powerful actors. While some sites are partisan in nature, a wide array of political viewpoints are available online.

The government advanced legislation to combat disinformation and foreign interference in advance of the October 2019 federal election. The Election Modernization Act, which went into effect in June 2019, provides for a number of reforms such as regulations on third-party online advertising and restrictions on how much campaigns can spend before the campaign season officially commences.⁵⁷ Anecdotally, the reforms seem to have had some effect, as there appear to have been few complaints or issues in this regard surrounding the October 2019 election or questions about the results, though an Elections Canada report found numerous instances of false election information being spread on social media.⁵⁸ The issue of false information being spread through social media has continued during the COVID-19 pandemic, allowing various conspiracies to spread and gain traction.⁵⁹

	2018	2019	2020
B6: Are there economic or regulatory constraints that negatively affect users' ability to publish content online? (0–3 points)	3	3	3

There are no economic or regulatory constraints on users' ability to publish legal content online, although the increasing willingness of provincial governments to tax internet services may have some effect in the future.

Canada has strengthened its commitment to net neutrality as a matter of national policy, ensuring that ISPs present web content neutrally. In 2017, the CRTC enacted a pair of telecommunications policies that effectively prohibited differential pricing for some data services offered by ISPs and the zero-rating of certain media services, barring ISPs from offering such preferred media free of charge.⁶⁰ With these policies, the CRTC substantively

⁵⁵ Equustek Solutions Inc. v Jack, 2018 BCSC 610, <https://www.canlii.org/en/bc/bpsc/doc/2018/2018bcsc610/2018bcsc610.html>.

⁵⁶ Crookes v. Newton, 2011 SCC 47, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/7963/index.do>.

⁵⁷ Elise von Scheel, "New rules for pre-election spending kick in Sunday," CBC News, June 29, 2019, <https://www.cbc.ca/news/politics/c76-election-pre-writ-rules-the-house-1.5193828>. Text of the Act can be found at https://laws-lois.justice.gc.ca/eng/annualstatutes/2018_31/page-1.html.

⁵⁸ Ashley Burke, "Social media users voiced fears about election manipulation during 2019 campaign, says Elections Canada," CBC News, January 30, 2020, <https://www.cbc.ca/news/politics/elections-canada-social-media-monitoring-findings-1.5444268>.

⁵⁹ Sam Cooper, "Nearly half of Canadians can't tell coronavirus fact from conspiracy theory: survey," Global News, May 20, 2020, <https://globalnews.ca/news/6962870/coronavirus-misinformation-carleton-survey/>.

⁶⁰ Telecom Regulatory Policy CRTC 2017-104, "Framework for assessing the differential pricing practices of Internet service providers," April 20, 2017, <https://crtc.gc.ca/eng/archive/2017/2017-104.htm>, and *Telecom Decision CRTC 2017-105*, "Complaints against Quebecor Media Inc., Videotron Ltd., and Videotron G.P. alleging undue and unreasonable preference and disadvantage regarding the Unlimited Music program," April 20, 2017, <https://crtc.gc.ca/eng/archive/2017/2017-105.htm>.

completed (in conjunction with several other policies) a national framework that ensures the continuation of net neutrality. In a May 2018 report, a parliamentary committee encouraged the government to strengthen net neutrality even further by enshrining the principle in the Telecommunications Act.⁶¹ Canadians have expressed concerns, however, that the repeal of net neutrality in the United States will have a negative effect on Canadians' internet activities,⁶² though some commentators have expressed doubts that these fears have come to pass.⁶³ Some commentators have argued that a January 2020 government report on the future of Canada's communications⁶⁴ with its focus on Canadian content will weaken net neutrality in Canada,⁶⁵ even though the report itself includes recommendations to "safeguard open Internet access in Canada, which is fundamental to net neutrality."⁶⁶

In its 2017 budget, the government promised to review telecommunications legislation to ensure that "Canadians continue to benefit from an open and innovative internet" in the context of net neutrality and other digital policy considerations. In January 2020, the government released the results of the review, in the form of a detailed report from a legislative review panel on the future of Canada's communications legislation.⁶⁶

The Department of Canadian Heritage, in the wake of its own report, announced a deal with Netflix in which the streaming service pledged to spend a minimum of C\$500 million (US\$377 million) on Canadian productions over the next five years.⁶⁷ In January 2020 the government recommended that the national Goods and Services Tax ("GST") should apply to "media communications services provided by foreign online providers," reversing a previous decision to exempt Netflix from the GST.⁶⁸ Numerous provinces including British Columbia, Quebec and Saskatchewan already levy provincial sales tax on out-of-province digital platforms, including Netflix, Google, Amazon, and, in Quebec's case, Spotify.⁶⁹

	2018	2019	2020
B7: Does the online information landscape lack diversity? (0–4 points)	4	4	4

The online environment in Canada is relatively diverse, and internet users have access to a wide range of news and opinions on a variety of topics. All major media organizations operate websites that feature articles and audio and video content. The public broadcaster maintains a comprehensive website that includes news articles and streamed video programming. Paywalls are increasingly used by newspapers publishing online, but many quality, independent news and commentary sites remain accessible for free.

⁶¹ *The Protection of Net Neutrality in Canada*, Report of the Standing Committee on Access to Information, Privacy and Ethics, May 2018, PDF report at <https://www.ourcommons.ca/Content/Committee/421/ETHI/Reports/RP9840575/ethirp14/ethirp14-e.pdf>

⁶² "Q&A: What would a U.S. repeal of net neutrality mean for Canadians?" CBC Radio News, December 8, 2017, <https://www.cbc.ca/radio/thecurrent/the-current-for-december-08-2017-the-current-1.4437902/q-a-what-would-a-u-s-repeal-of-net-neutrality-mean-for-canadians-1.4437993>.

⁶³ Ken Engelhart, "The net neutrality fanatics were wrong," *National Post*, November 21, 2019, <https://financialpost.com/opinion/the-net-neutrality-fanatics-were-wrong>.

⁶⁴ Innovation, Science and Economic Development Canada, "Canada's communications future: Time to act," <https://www.ic.gc.ca/eic/site/110.nsf/eng/00012.html>.

⁶⁵ Michael Geist, "Not Neutral: Why the Broadcast Panel Report Weakens Net Neutrality in Canada," February 5, 2020, <http://www.michaelgeist.ca/2020/02/not-neutral-why-the-broadcast-panel-report-weakens-net-neutrality-in-canada/>.

⁶⁶ Innovation, Science and Economic Development Canada, "Canada's communications future: Time to act," <https://www.ic.gc.ca/eic/site/110.nsf/eng/00012.html>.

⁶⁷ Daniel Leblanc, "Netflix deal the centrepiece of cultural policy," *The Globe and Mail*, September 27, 2017, <https://beta.theglobeandmail.com/news/politics/ottawa-to-unveil-500-million-netflix-deal-as-part-of-cultural-policy-overhaul/article36414401/?ref=http://www.theglobeandmail.com&>.

⁶⁸ Innovation, Science and Economic Development Canada, "Canada's communications future: Time to act," <https://www.ic.gc.ca/eic/site/110.nsf/eng/00012.html>; The Canadian Press, "Netflix tax not in the cards, Finance Minister Bill Morneau says," *The Star*, December 10, 2017, <https://www.thestar.com/news/canada/2017/12/10/netflix-tax-not-in-the-cards-finance-minister-bill-morneau-says.html>.

⁶⁹ CBC News, "What the new 'Netflix tax' means for B.C. users," February 19, 2020, <https://www.cbc.ca/news/canada/british-columbia/new-tax-on-streaming-services-1.5468709>.

	2018	2019	2020
B8: Do conditions impede users' ability to mobilize, form communities, and campaign, particularly on political and social issues? (0–6 points)	5	6	6

Digital mobilization tools, including social media platforms and communication apps, are available and used to build support for political and social movements. Online activism played a significant role in the Liberal government's promise to repeal the problematic aspects of the Anti-Terrorism Act and influenced the government to introduce a new bill, Bill C-59, to reform it (see C5). Much online activism that targets the ICT sector is spearheaded by a popular nonpartisan, nonprofit organization called Open Media, which advocates for three pillars of internet rights—free expression, access, and privacy.⁷⁰

Canadians have been especially active in the online #MeToo movement,⁷¹ which prompted the justice minister to consider updating laws to ensure victims of sexual violence are treated more compassionately in courtrooms.⁷² This online activism also influenced the government to introduce Bill C-65,⁷³ which became law in October 2018 and dramatically updated the harassment legal framework as it applies to the federal government and federally regulated workplaces.⁷⁴ Online activism likely played a role in the decision to legalize cannabis countrywide,⁷⁵ which went into effect in October 2018. As will be true around in the world, the global pandemic will certainly emphasize the importance of online activism in any number of areas in Canada, as real-life protests move online.⁷⁶

C. Violations of User Rights

Freedom of expression online is largely respected. Users are not prosecuted for their online activity, and they can communicate anonymously and freely using encryption tools. Promised reforms to controversial elements of the 2015 Anti-Terrorism Act, which permits information sharing across government agencies for a wide range of purposes, were passed in June 2019.

	2018	2019	2020
C1: Do the constitution or other laws fail to protect rights such as freedom of expression, access to information, and press freedom, including on the internet, and are they enforced by a judiciary that lacks independence? (0–6 points)	5	5	5

The constitution includes strong protections for freedom of speech and freedom of the press. Freedom of speech is protected as a "fundamental freedom" by Section 2 of the Canadian Charter of Rights and Freedoms. Under the charter, one's freedom of expression is "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."⁷⁷ These protections apply to all forms of speech, whether online or offline. There are a few restrictions that apply to online speech (see C2).

	2018	2019	2020
C2: Are there laws that assign criminal penalties or civil liability for online activities? (0–4 points)	2	2	2

⁷⁰ See <https://openmedia.org/>.

⁷¹ Adina Bresge, "#Metoo movement prompting sexual-assault survivors to break silence to family," *National Post*, January 31, 2018, <https://nationalpost.com/pmn/news-pmn/canada-news-pmn/metoo-movement-prompts-sexual-assault-survivors-to-break-silence-to-family>.

⁷² Kate Taylor, "Where to go after #MeToo," *The Globe and Mail*, December 9, 2017, <https://tgam.ca/2GNPCW1>.

⁷³ An Act to amend the Canada Labour Code (harassment and violence), the Parliamentary Employment and Staff Relations Act and the Budget Implementation Act, 2017, No. 1, 42nd Parliament, 1st Session, <https://www.parl.ca/LegisInfo/BillDetails.aspx?billId=9220285&Language=E>.

⁷⁴ Statutes of Canada, chapter 22, available at <https://www.parl.ca/DocumentViewer/en/42-1/bill/C-65/royal-assent>.

⁷⁵ Ian Brown, "'The new activism isn't about laws': Stigma lingers despite end of cannabis prohibition," *The Globe and Mail*, October 17, 2018, <https://www.theglobeandmail.com/cannabis/article-the-stigma-that-survives-will-determine-whether-cannabis-becomes-an/>

⁷⁶ See e.g. Julia Peterson, "Post-secondary funding protest moves online amidst COVID-19 concerns Social Sharing,", *CBC News*, March 20, 2020, <https://www.cbc.ca/news/canada/saskatchewan/budget-day-protest-online-saskatchewan-1.5504899>.

⁷⁷ Constitution Act, Canadian Charter of Rights and Freedoms, 1982, <https://laws-lois.justice.gc.ca/eng/const/page-15.html>.

Users can face significant criminal penalties for some forms of online expression, as well as civil liability for defamation emanating from common law principles. Some provincial defamation laws and the general civil liability regime in Quebec also limit freedom of expression online.

Hate speech, along with advocating genocide and uttering threats and defamatory libel, are also regulated under the Criminal Code.⁷⁸ Punishment for defamatory libel, advocating genocide, and uttering threats may include imprisonment for up to five years. Hate speech is punishable by up to two years in prison. Human rights complaints regarding potentially defamatory statements can be decided through the mechanisms provided by provincial human rights laws and the Canadian Human Rights Act (CHRA).⁷⁹ However, the controversial provision of the CHRA prohibiting online hate speech (s. 13), which was criticized for being overly broad, was repealed in 2013.⁸⁰ The previous Liberal government considered reviving the provision in some form,⁸¹ but the idea did not progress.

	2018	2019	2020
C3: Are individuals penalized for online activities? (0–6 points)	6	6	6

Individuals were not arrested or prosecuted for online activities that are protected under international human rights standards during the coverage period. Generally, writers, commentators, and bloggers are not subject to legal sanction for content that they post on the internet. Internet users are free to discuss any political or social issues without risk of prosecution, unless the discourse violates the hate speech provisions in the Criminal Code.

Canadian courts are taking a more proactive approach to stopping online defamation, especially by granting increasingly large damages awards, including two significant awards of C\$200,000 (US\$143,000)⁸² and C\$700,000 (US\$500,000).⁸³ During the reporting period, a judge issued significant awards for defamation against anonymous online defendants for only the second time in Canadian legal history.⁸⁴

	2018	2019	2020
C4: Does the government place restrictions on anonymous communication or encryption? (0–4 points)	4	4	4

The government does not impose any restrictions on anonymous communication or encryption. Canadians are free to use encryption services and communicate anonymously online, without any fear of civil or criminal sanction. In August 2019, the Minister of Public Safety and Emergency Preparedness suggested that technology companies must actively combat the online exploitation of children, which he said is facilitated by encrypted communications.⁸⁵ The Minister's comments followed communiques from the Five Country Ministerial, of which Canada is a member, criticizing technology companies that provide encrypted products that preserve anonymity and preclude law enforcement access to content in July and October 2019.⁸⁶

⁷⁸ R.S.C 1985 c. C-46, <https://laws-lois.justice.gc.ca/eng/acts/C-46/FullText.html>.

⁷⁹ R.S.C., 1985, c. H-6, <https://laws-lois.justice.gc.ca/eng/acts/H-6/FullText.html>.

⁸⁰ Bill C-304, An Act to amend the Canadian Human Rights Act (protecting freedom), S.C. 2013, c. 37, <https://www.parl.ca/LegisInfo/BillDetails.aspx?billId=5124394&Language=E&Mode=1>.

⁸¹ Brian Platt, "Liberals reviewing option to revive controversial internet hate speech law repealed in 2013," *National Post*, January 22 2018, <https://nationalpost.com/news/politics/liberals-reviewing-option-to-revive-controversial-hate-speech-law-repealed-in-2013>.

⁸² *Rook v. Halcrow*, 2019 BCSC 2253, <https://www.bccourts.ca/db-txt/sc/19/22/2019BCSC2253.htm>.

⁸³ *Rutman v. Rabinowitz*, 2018 ONCA 80, <https://www.canlii.org/en/on/onca/doc/2018/2018onca80/2018onca80.html>.

⁸⁴ *Theralase Technologies Inc. v. Lanter*, 2020 ONSC 205, January 13, 2020,

<https://www.canlii.org/en/on/onsc/doc/2020/2020onsc205/2020onsc205.html>.

⁸⁵ <https://nationalpost.com/news/politics/were-closer-to-the-knifes-edge-confrontation-looming-on-encryption-backdoors-as-goodale-looks-for-balance>

⁸⁶ <https://www.gov.uk/government/publications/five-country-ministerial-communique/joint-meeting-of-five-country-ministerial-and-quintet-of-attorneys-general-communique-london-2019>;

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/822818/Joint_Meeting_of_FCM_and_Quintet_of_Attorneys_FINAL.pdf

	2018	2019	2020
C5: Does state surveillance of internet activities infringe on users' right to privacy? (0–6 points)	3	3	4

State surveillance of internet users under limited circumstances may infringe on privacy rights. In 2015, the government passed Bill C-51, the Anti-Terrorism Act. Bill C-51 permits information sharing across government agencies for a wide range of purposes, many of which are unrelated to terrorism. Several efforts to reform Canada's antiterrorism laws finally materialized, most recently with Bill C-59.

In June 2017, the government introduced Bill C-59, an Act Respecting National Security Matters,⁸⁷ which addresses some of the more problematic provisions in the Anti-Terrorism Act.⁸⁸ In June 2019, Parliament passed Bill C-59.⁸⁹ Bill C-59 limits a number of the broad criminal speech provisions from Bill C-51, although some remain. The bill enhances parliamentary accountability and oversight through the creation of the National Security and Intelligence Review Agency and the Office of the Intelligence Commissioner.⁹⁰ The bill gives the Communications Security Establishment the authority to implement active cyber operations, although these powers are more limited compared to those provided by Bill C-51.⁹¹ Despite a number of improvements, some civil liberties groups raised concerns that Bill C-59 does not effectively fix the broad surveillance issues posed by Bill C-51,⁹² and that it still grants Communications Security Establishment too many powers, including the mass collection of data.⁹³

The Office of the Privacy Commissioner (OPC) provides an important oversight function concerning the privacy of users' data. The privacy commissioner, Daniel Therrien, is an officer of Parliament who reports directly to the House of Commons and the Senate. The commissioner's mandate includes overseeing compliance with the Privacy Act,⁹⁴ which covers the practices of federal government departments and agencies related to the handling of personal information.

A general right to privacy is not enshrined in Canadian law, though the Canadian Charter of Rights and Freedoms includes a right to be secure against unreasonable search or seizure.⁹⁵ In his latest annual report, the Privacy Commissioner called for Parliament to legislate a right to privacy and affirm a human rights-based approach to federal privacy legislation.⁹⁶ Following the October 2019 election, the Prime Minister mandated several of his Ministers to expand online rights.⁹⁷

The SCC continues to expand privacy rights. Most recently, in December 2018, the court ruled that privacy rights are still protected when a computer is shared with others.⁹⁸ In 2017, the court extended the right to privacy to text messages in a pair of companion cases. First, the court held that there could be a reasonable expectation of privacy in received text messages, whereas previously, privacy protections only applied to sent messages.⁹⁹ In the second case, the court held that the sender of text messages has a reasonable expectation of privacy, even when they are stored on the telecommunications provider's computers.¹⁰⁰

The Covid-19 pandemic has provided governments with the opportunity to potentially erode privacy rights; for

⁸⁹ Catharine Tunney, "Canada's national security landscape will get a major overhaul this summer," *CBC News*, June 23, 2019, <https://www.cbc.ca/news/politics/bill-c59-national-security-passed-1.5182948>

⁹⁰ Catharine Tunney, "Canada gets its first-ever intelligence commissioner," *CBC News*, July 18, 2019, <https://www.cbc.ca/news/politics/intelligence-commissioner-plouffe-1.5216443>; International Civil Liberties Monitoring Group, "Bill C-59: Changes to C-51," last accessed January 2020, <https://iclmg.ca/issues/bill-c-59-the-national-security-act-of-2017/bill-c-59s-changes-to-c-51/>; Preston Lim, *Canada Considers Most Far-Reaching Intell Reforms in Decades*, Just Security, May 13, 2019, <https://www.justsecurity.org/64030/canada-considers-most-far-reaching-intell-reforms-in-decades/>

⁹¹ Victoria Henry, "C-59: A Promise Not Kept," OpenMedia, July 11, 2019, <https://openmedia.org/en/c-59-promise-not-kept>

⁹² "Read CCLA's Submissions on Bill C-59," Canadian Civil Liberties Association, January 19, 2018, <https://ccla.org/read-cclas-submissions-bill-c-59/>.

⁹³ International Civil Liberties Monitoring Group, "Bill C-59, The National Security Act, 2017, is now law. Parliamentarians have failed to protect Canadians' rights and freedoms," June 18, 2019, <https://iclmg.ca/c59-is-law/>; Victoria Henry, "C-59: A Promise Not Kept," OpenMedia, July 11, 2019, <https://openmedia.org/en/c-59-promise-not-kept>

⁹⁴ R.S.C., 1985, c. P-21, <https://laws-lois.justice.gc.ca/eng/acts/P-21/index.html>

⁹⁵ *Canadian Charter of Rights and Freedoms*, s 8, <https://laws-lois.justice.gc.ca/eng/const/page-15.html>.

⁹⁶ OPC, "Privacy Law Reform - A Pathway to Respecting Rights and Restoring Trust in Government and the Digital Economy - 2018-2019 Annual Report to Parliament on the Privacy Act and the Personal Information Protection and Electronic Documents Act," December 2019, https://www.priv.gc.ca/en/opc-actions-and-decisions/ar_index/201819/ar_201819.

⁹⁷ See e.g. Rt. Hon. Justin Trudeau, "Minister of Justice and Attorney General of Canada Mandate Letter," December 13, 2019, <https://pm.gc.ca/en/mandate-letters/2019/12/13/minister-justice-and-attorney-general-canada-mandate-letter>.

⁹⁸ R. v. Reeves, 2018 SCC 56, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/17405/index.do>.

⁹⁹ R. v. Marakah, 2017 SCC 59, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/16896/index.do>.

¹⁰⁰ R. v. Jones, 2017 SCC 60, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/16897/index.do>.

example, the Ontario government's emergency order has given them the power to share individuals' personal information in their possession with first responders including police officers and paramedics.¹⁰¹

	2018	2019	2020
C6: Are service providers and other technology companies required to aid the government in monitoring the communications of their users? (0–6 points)	4	4	4

Both ISPs and mobile service providers may be legally required to aid the government in monitoring communications of their users.

The OPC and Canada's Privacy Commissioner oversee compliance with the private sector privacy law,¹⁰² the Personal Information Protection and Electronic Documents Act (PIPEDA).¹⁰³ PIPEDA was modified by the Digital Privacy Act¹⁰⁴ passed in 2015. The Digital Privacy Act expanded the scope for companies to make voluntary warrantless disclosures of personal information under certain circumstances, by allowing for such disclosures to any organization, not just law enforcement. The act also established new mandatory security breach disclosure requirements, which came into force in November 2018.¹⁰⁵ PIPEDA, however, remains relatively toothless.

A Standing Committee on Access to Information, Privacy, and Ethics (ETHI) report released in February 2018 called for significant changes to strengthen PIPEDA and better align it with the EU General Data Protection Regulation (GDPR),¹⁰⁶ as did the government's January 2020 report on legislative reform of the communications sector.¹⁰⁷

The OPC has also called for changes to the Privacy Act, which has not been significantly amended since 1983. The commission argues that the act is outdated and does not reflect the privacy concerns of the digital age. The OPC also asserts that it allows the government too much latitude to collect personal information.¹⁰⁸

The OPC shocked the legal community in January 2018 when it released a draft position paper concluding that PIPEDA contained a European-style "right to be forgotten" provision.¹⁰⁹ Commentators questioned the OPC's conclusions and reasoning.¹¹⁰ In October 2018, the OPC submitted a reference question to the Federal Court to clarify whether indexing web pages and presenting results about a person's name in Google's search function fall under PIPEDA. If the Federal Court replies that these actions are subject to PIPEDA, it would support the right to be forgotten position.¹¹¹ It is unclear when the Federal Court will issue its decision.¹¹² The ETHI report called for the right to be forgotten to be included in future PIPEDA amendments. During the coverage period, the Prime

¹⁰¹ Beatrice Britneff, "Privacy experts raise red flags as Ontario first responders get access to COVID-19 info," Global News, April 7, 2020, <https://globalnews.ca/news/6788234/privacy-experts-red-flags-covid-19-info/>.

¹⁰² Office of the Privacy Commissioner of Canada, "About the OPC," <https://web.archive.org/web/20170330201210/https://www.priv.gc.ca/en/about-the-opc/>.

¹⁰³ Personal Information Protection and Electronic Documents Act (PIPEDA), S.C. 2000, c. 5, https://laws-lois.justice.gc.ca/eng/annualstatutes/2015_32/page-1.html.

¹⁰⁴ Digital Privacy Act, S.C. 2015, c. 32, https://laws-lois.justice.gc.ca/eng/annualstatutes/2015_32/page-1.html.

¹⁰⁵ Breach of Security Safeguards Regulations, published in the Canada Gazette SOR/2018-64, Part II: Volume 152, Number 8, on March 27, 2018, <http://www.gazette.gc.ca/rp-pr/p2/2018/2018-04-18/html/sor-dors64-eng.html>.

¹⁰⁶ "Towards Privacy by Design: Review of the Personal Information Protection and Electronic Documents Act," ETHI Committee Report, February 2018, <https://www.ourcommons.ca/DocumentViewer/en/42-1/ETHI/report-12/page-ToC>. See also Allen Mendelsohn (this report's author), "Privacy! Privacy! Privacy!", March 28, 2018, <http://allenmendelsohn.com/2018/03/privacy-privacy-privacy/>.

¹⁰⁷ Innovation, Science and Economic Development Canada, "Canada's communications future: Time to act," , section 4.3.1.

¹⁰⁸ Alex Boutilier, "Ottawa is 'blurring' lines on privacy as it looks for new ways to collect data: watchdog," *The Star*, February 21, 2018, <https://www.thestar.com/news/canada/2018/02/21/ottawa-is-blurring-lines-on-privacy-as-it-looks-for-new-ways-to-collect-data-watchdog.html>

¹⁰⁹ "Draft OPC Position on Online Reputation," Office of the Privacy Commissioner of Canada, January 28, 2018, https://www.priv.gc.ca/en/about-the-opc/what-we-do/consultations/completed-consultations/consultation-on-online-reputation/pos_or_201801/.

¹¹⁰ See e.g. Michael Geist, "Why the Canadian Privacy Commissioner's Proposed Right to be Forgotten Creates More Problems Than it Solves," January 29, 2018, at <http://www.michaelgeist.ca/2018/01/privacycommishrbf/>; and Allen Mendelsohn (this report's author), "Surprise! Canada has had a Right To Be Forgotten all along!," January 30, 2018, at <http://allenmendelsohn.com/2018/01/surprise-canada-has-had-a-right-to-be-forgotten-all-along/>.

¹¹¹ OPC, "Privacy Commissioner seeks Federal Court determination on key issue for Canadians' online reputation," OPC press release, October 10, 2018, https://www.priv.gc.ca/en/opc-news/news-and-announcements/2018/an_181010/.

¹¹² See Federal Court case information, file number T-1779-18, accessible at <https://www.fct-cf.gc.ca/en/court-files-and-decisions/court-files>.

Minister¹¹³ and the Privacy Commissioner¹¹⁴ both called for reform to Canada's privacy laws, including adding a right to be forgotten.

The OPC conducts investigations into major data breaches to determine whether private companies comply with PIPEDA. In its investigation into the 2017 Equifax breach, the OPC found major PIPEDA violations. In response, Equifax took numerous corrective measures and signed a compliance agreement.¹¹⁵ In the OPC's investigation into the Cambridge Analytica scandal, Facebook refused to take significant corrective measures or implement the OPC's recommendations.¹¹⁶ In May 2019, Facebook's CEO Mark Zuckerberg and COO Sheryl Sandberg ignored a subpoena from a parliamentary committee to testify on the scandal.¹¹⁷ In February 2020, the OPC filed an application in Federal Court seeking a declaration that Facebook had violated PIPEDA in the scandal and orders requiring Facebook to take corrective action.¹¹⁸

Numerous court decisions have made it easier for Canadians to seek legal redress against foreign internet companies for privacy violations. In a landmark 2017 decision, the SCC ruled that residents of British Columbia could bring a class action suit against Facebook for violating certain privacy rights in a British Columbia court, despite Facebook's choice of forum clause specifying California.¹¹⁹ Other courts followed up on this decision, with a Quebec court deciding that Yahoo's choice of forum clause was inoperative, as its terms and conditions were deemed to be a consumer contract that granted jurisdiction to Quebec.¹²⁰ While the choice of forum clause in the case chose another Canadian province (Ontario), it is clear that the same reasoning could apply internationally. In another dramatic development, in 2017 the Federal Court found that PIPEDA has extraterritorial application, and ordered a Romanian website to remove court decisions that contained easily searchable personal information of Canadian citizens. The site was ordered to never post such information again.¹²¹ The court also ordered the website to pay damages to the plaintiff.

	2018	2019	2020
C7: Are individuals subject to extralegal intimidation or physical violence by state authorities or any other actor in retribution for their online activities? (0–5 points)	5	5	5

There were no documented cases of violence or physical harassment in retaliation for online activities during the reporting period. However, cyberbullying, cyberstalking, and general online harassment, particularly affecting young people, is on the rise.¹²² A 2016 study found that a quarter of Canadians have been subjected to some form of online harassment,¹²³ while a recent report indicated that one-third of Canadian parents know a child in their community who had experienced cyberbullying.¹²⁴ The government has recognized the seriousness of the issue,

¹¹³ See e.g. Rt. Hon. Justin Trudeau, "Minister of Justice and Attorney General of Canada Mandate Letter," December 13, 2019, <https://pm.gc.ca/en/mandate-letters/2019/12/13/minister-justice-and-attorney-general-canada-mandate-letter>.

¹¹⁴ OPC, "Privacy Law Reform - A Pathway to Respecting Rights and Restoring Trust in Government and the Digital Economy - 2018-2019 Annual Report to Parliament on the Privacy Act and the Personal Information Protection and Electronic Documents Act," December 2019, https://www.priv.gc.ca/en/opc-actions-and-decisions/ar_index/201819/ar_201819.

¹¹⁵ OPC, "Investigation into Equifax Inc. and Equifax Canada Co.'s compliance with PIPEDA in light of the 2017 breach of personal information - PIPEDA Report of Findings #2019-001," April 9, 2019, <https://www.priv.gc.ca/en/opc-actions-and-decisions/investigations/investigations-into-businesses/2019/pipeda-2019-001>.

¹¹⁶ OPC, "Joint investigation of Facebook, Inc. by the Privacy Commissioner of Canada and the Information and Privacy Commissioner for British Columbia - PIPEDA Report of Findings #2019-002," April 25, 2019, <https://www.priv.gc.ca/en/opc-actions-and-decisions/investigations/investigations-into-businesses/2019/pipeda-2019-002>.

¹¹⁷ Alex Boutilier, "Facebook's Zuckerberg and Sandberg named in unprecedented summons issued by MPs," *The Star*, May 28, 2019, <https://www.thestar.com/news/canada/2019/05/28/facebook-s-zuckerberg-and-sandberg-named-in-unprecedented-summons-issued-by-mps.html>.

¹¹⁸ OPC, "Privacy Commissioner files Notice of Application with the Federal Court against Facebook, Inc," February 6, 2020, https://www.priv.gc.ca/en/opc-news/news-and-announcements/2020/an_200206/.

¹¹⁹ Douez v. Facebook, Inc., 2017 SCC 33, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/16700/index.do>.

¹²⁰ Demers c. Yahoo! Inc., 2017 QCCS 4154, <https://www.canlii.org/en/qc/qccs/doc/2017/2017qccs4154/2017qccs4154.html>.

¹²¹ A.T. v. Globe24h.com, 2017 FC 114 (CanLii), <https://www.canlii.org/en/ca/fct/doc/2017/2017fc114/2017fc114.html>.

¹²² "More than 1 million young Canadians victims of cyberbullying, cyberstalking: StatsCan," *CBC News*, December 19, 2016, <https://www.cbc.ca/news/technology/million-canadians-cyberbullying-cyberstalking-statscan-1.3903435>.

¹²³ Victor Ferreira, "More than a quarter of Canadians are subjected to harassment on social media, new poll finds," *National Post*, October 21, 2016, <https://nationalpost.com/news/canada/more-than-a-quarter-of-canadians-are-subjected-to-harassment-on-social-media-new-poll-finds>.

¹²⁴ Maham Abeti, "Even with more awareness, cyberbullying isn't declining in Canada: Ipsos poll," *Global News*, June 27, 2018, <https://globalnews.ca/news/4299734/cyberbullying-cases-awareness-canada-poll/>.

and announced in 2017 that it would develop a coordinated strategy,¹²⁵ though there has been little progress.

The legal precedence of a noteworthy “revenge porn” case has taken on new significance. In a highly praised 2016 landmark civil court decision, a man who published revenge porn featuring his ex-girlfriend was ordered to pay C\$100,000 (US\$75,000) to the victim, who suffered severe emotional distress.¹²⁶ Later that year, however, the default judgment was set aside,¹²⁷ and an appeal of this decision was denied.¹²⁸ As a result, the new privacy tort of “public disclosure of private facts” established in the original decision was in a state of flux. Notwithstanding the procedural issues with the original case, the new tort was applied in a November 2018 case, in which an individual was found liable for posting a sexually explicit video of a person without their consent on a pornographic website, and ordered to pay C\$100,000 (US\$75,000) in damages.¹²⁹ In December 2019, a court cited the tort in awarding significant damages in a complicated family law case, involving a man cyberbullying his ex-wife and posting negative videos of their minor children online.¹³⁰ The 2016 case continues to be cited by other plaintiffs, authors, and courts.¹³¹

Additionally, many provinces, including Manitoba¹³² and Alberta,¹³³ have passed laws that create civil torts for unauthorized distribution of intimate images and videos. Individuals are still prosecuted under Section 162.1 of the Criminal Code, which makes it a crime to publish, distribute, transmit, or sell intimate images without the consent of the person depicted.¹³⁴ Canadian police forces have received over 5,000 complaints under the law since it went into effect in December 2014.¹³⁵

	2018	2019	2020
C8: Are websites, governmental and private entities, service providers, or individual users subject to widespread hacking and other forms of cyberattack? (0–3 points)	2	2	2

Cyberattacks and data breaches are becoming a serious issue in Canada. With a new requirement that private companies report data breaches to the OPC, the number of reports of such breaches has increased six-fold over the previous year.¹³⁶ It is unclear whether the number of breaches is increasing or the mandatory reporting requirement has led to more reports. Over the same year, the OPC reports that over 28 million Canadians were victims of a data breach.¹³⁷ 57% of Canadian Internet users reported experiencing some sort of cyber security incident in 2018.¹³⁸ During the coverage period, major Canadian companies were subject to numerous cyberattacks and data breaches, including Lifelabs, Canada’s largest healthcare lab testing company, and Desjardins Group, one of Canada’s largest banking groups.¹³⁹

¹²⁵ “Feds eye sexting, cyber violence strategy,” CBC News, March 27, 2017, <https://www.cbc.ca/news/canada/sudbury/cyber-violence-harassment-sexting-1.4042232>.

¹²⁶ Doe 464533 v N.D., 2016 ONSC 541 (CanLII), <http://canlii.ca/t/gn23z>.

¹²⁷ Doe v N.D., 2016 ONSC 4920 (CanLII), <https://www.canlii.org/en/on/onsc/doc/2016/2016onsc4920/2016onsc4920.html>.

¹²⁸ Doe 464533 v N.D., 2017 ONSC 127 (CanLII), <https://www.canlii.org/en/on/onsc/doc/2017/2017onsc127/2017onsc127.html>.

¹²⁹ Jane Doe 72511 v. Morgan, 2018 ONSC 6607. See Omar Ha-Redeye, “Public Disclosure of Private Facts – Redux,” Slaw.ca, November 11, 2018, <http://www.slaw.ca/2018/11/11/public-disclosure-of-private-facts-redux/>.

¹³⁰ Yenovkian v. Gulian, 2019 ONSC 7279,

<https://www.canlii.org/en/on/onsc/doc/2019/2019onsc7279/2019onsc7279.html>.

¹³¹ Omar Ha-Redeye, “Public Disclosure of Private Facts – Redux,” Slaw.ca, November 11, 2018, <http://www.slaw.ca/2018/11/11/public-disclosure-of-private-facts-redux/>.

¹³² Intimate Image Protection Act, C.C.S.M. c. I87, https://web2.gov.mb.ca/laws/statutes/ccsm/_pdf.php?cap=i87.

¹³³ Protecting Victims of Non-Consensual Distribution of Intimate Images Act, S.A. 2017 ch. P-26.9, <http://www.qp.alberta.ca/documents/Acts/P26p9.pdf>.

¹³⁴ See e.g. R. v. P.S.D., 2016 BCPC 400 (CanLII), <https://www.canlii.org/en/bc/bcpc/doc/2016/2016bcpc400/2016bcpc400.html>, and R. v. A.C., 2017 ONCJ 129, <https://www.canlii.org/en/on/oncj/doc/2017/2017oncj129/2017oncj129.html?resultIndex=1>.

¹³⁵ Bonnie Allen, “Revenge porn and sext crimes: Canada sees more than 5,000 police cases as law marks 5 years,” CBC News, December 24, 2019, <https://www.cbc.ca/news/canada/saskatchewan/revenge-porn-and-sext-crimes-canada-sees-more-than-5-000-police-cases-as-law-marks-5-years-1.5405118>.

¹³⁶ OPC, “A full year of mandatory data breach reporting: What we’ve learned and what businesses need to know,” October 31, 2019, <https://www.priv.gc.ca/en/blog/20191031/>.

¹³⁷ Ibid.

¹³⁸ Statistics Canada, *Cybercrime in Canada*, December 2, 2019, <https://www150.statcan.gc.ca/n1/pub/89-28-0001/2018001/article/00015-eng.htm>.

¹³⁹ Aidan Wallace, “Major data breaches in 2019,” January 1, 2020, *Toronto Sun*, <https://torontosun.com/news/world/major-data-breaches-in-2019>.

The Federal government and its agencies continue to be beset by various forms of cyberattacks and data breaches. In 2018 and 2019, agencies suffered thousands of privacy breaches affecting the personal information of 144,000 Canadians. The number is probably much higher due to under-reporting.¹⁴⁰ The governor of the Bank of Canada has stated that cyberattacks are the most pressing concern for the financial system,¹⁴¹ and the deputy privacy commissioner has expressed similar concerns.¹⁴²

Optional topics

Optional topic 1: Biometric surveillance (see subquestions)

Use of facial recognition software has become a significant issue in Canada in both the public and private sectors, and has attracted the attention of Canada's privacy authorities. In March 2020, the Royal Canadian Mounted Police (RCMP), Canada's national police force, admitted to having used facial recognition software (Clearview AI) after having first denied it.¹⁴³ The OPC has launched an investigation into the RCMP's use of Clearview AI as a violation of the Privacy Act.¹⁴⁴ Furthermore, the OPC and the privacy commissioners of Canada's three largest provinces have launched a joint investigation of Clearview AI's practices in general.¹⁴⁵ In light of these investigations, Clearview has suspended the use of its facial recognition technology in Canada.¹⁴⁶ This follows in the wake of the OPC investigating Canadian real estate giant Cadillac Fairview's use of facial recognition in their shopping malls in 2018;¹⁴⁷ that investigation is still ongoing.¹⁴⁸

¹⁴⁰ Catharine Tunney, "Personal information belonging to 144,000 Canadians breached by federal departments and agencies," *CBC News*, February 14, 2020, <https://www.cbc.ca/news/politics/privacy-breach-canada-1.5457502>.

¹⁴¹ Andy Blatchford, "Threat of cyberattacks 'more worrisome than all the other stuff': Bank of Canada governor," *The Star*, October 26, 2017, <https://www.thestar.com/business/2017/10/26/threat-of-cyberattacks-more-worrisome-than-all-the-other-stuff-bank-of-canada-governor.html>.

¹⁴² Gregory Smolynec (Deputy Privacy Commissioner), "Appearance before the Standing Committee on Public Safety and National Security (SECU) on Cybersecurity in the Financial Sector as a National Economic Security Issue," April 3, 2019, https://www.priv.gc.ca/en/opc-actions-and-decisions/advice-to-parliament/2019/parl_20190403/

¹⁴³ Catharine Tunney, "RCMP denied using facial recognition technology - then said it had been using it for months," *CBC News*, March 4, 2020, <https://www.cbc.ca/news/politics/clearview-ai-rcmp-facial-recognition-1.5482266>.

¹⁴⁴ OPC News Release, "OPC launches investigation into RCMP's use of facial recognition technology,", February 28, 2020, https://www.priv.gc.ca/en/opc-news/news-and-announcements/2020/an_200228/.

¹⁴⁵ OPC News Release, "Commissioners launch joint investigation into Clearview AI amid growing concerns over use of facial recognition technology," February 21, 2020, https://www.priv.gc.ca/en/opc-news/news-and-announcements/2020/an_200221/.

¹⁴⁶ OPC News Release, "Clearview AI ceases offering its facial recognition technology in Canada," July 6, 2020, https://www.priv.gc.ca/en/opc-news/news-and-announcements/2020/nr-c_200706/. Please note this development occurred after the coverage period.

¹⁴⁷ OPC News Release, "Privacy Commissioner launches investigation into Cadillac Fairview over use of facial recognition technology in malls," August 3, 2018, https://www.priv.gc.ca/en/opc-news/news-and-announcements/2018/an_180803/.

¹⁴⁸ OPC, 2020-21 Departmental Plan, December 2019, https://www.priv.gc.ca/en/about-the-opc/opc-operational-reports/planned-opc-spending/dp-index/2020-2021/dp_2020-21/.

