

Canada

	2019	2020	2021
Internet Freedom Status	Free	Free	Free
A. Obstacles to Access (0-25pts)	23	23	23
B. Limits on Content (0-35pts)	33	32	32
C. Violations of User Rights (0-40pts)	31	32	32
TOTAL* (0-100)	87	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 online environment is among the most open in the world, despite a concerning court decision that blocked websites hosting copyright-infringing content during the coverage period. 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 in recent years citizens have been concerned about the scope of government surveillance laws and privacy rights. While indigenous peoples and other vulnerable populations still face discrimination and other economic, social, and political challenges, the federal government has acknowledged and made some moves to address these issues.

Key Developments, June 1, 2020 - May 31, 2021

- [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.

	2019	2020	2021
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 over 98 percent of Canadian households through a variety of fixed-line and wireless technologies, according to the regulatory body that oversees the communications industry, the Canadian Radio-television and Telecommunications

Commission (CRTC).¹² In 2019, the CRTC shifted its focus to “high-quality” internet service, defined as offering 50 Mbps download speeds, 10 Mbps upload speeds, and unlimited data transfers, with the goal of 90 percent household availability by 2021, and 100 percent availability by 2031,³ which is referred to as Canada’s “Universal Service Objective.”⁴ Canada is making progress on that front, moving from 85.7% in 2018 to 87.4% availability in 2019,⁵ the most recently available data.

In a landmark policy decision released in 2016,⁶ the CRTC recognized the importance of ultra-high-speed (50 Mbps download speeds and above) internet access for the future of the economy. That year, 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 without data caps. Furthermore, it declared high-speed internet access a “basic telecommunications service” and established a C\$750 million (\$559 million) fund to reach those targets.⁷ In September 2018, the CRTC announced criteria for the fund’s use.⁸ A second round of calls for project applications was opened in November 2019,⁹ and these funds have begun to be distributed in early 2021.¹⁰

	2019	2020	2021
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. The government named universal access as the first of ten draft principles for a digitally connected Canada in its October 2019 Digital Charter.¹¹

Mobile broadband data remains expensive compared to fixed-line broadband data. High-speed, fixed-line access remains affordable due to robust competition; prices became even more competitive in 2016 when the CRTC reduced the price of wholesale high-speed internet access.¹²

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.¹³ Furthermore, approximately 75 percent of the population lives within 160 kilometers of the border with the

¹ Canadian Radio-television and Telecommunications Commission, “Communications Monitoring Report 2020,” December 10, 2020, <https://crtc.gc.ca/eng/publications/reports/policymonitoring/2020/index.htm>. ; Statistics taken from “LTE and Broadband Availability” (Table 4.2 Broadband service availability, by speed and province/territory)” at <https://crtc.gc.ca/eng/publications/reports/policyMonitoring/2020/cmr4.htm>.

² *Ibid*, see figure 9.22.

³ Canadian Radio-television and Telecommunications Commission, “Departmental Plan 2019-2020,” April 2019, <https://crtc.gc.ca/eng/publications/reports/dp2019/dp2019.htm>.

⁴ See “LTE and Broadband Availability,” *supra* note 1, at Table 4.1.

⁵ *Ibid*, Infographic 4.3.

⁶ 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.

⁷ “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>.

⁸ 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>.

⁹ CRTC Telecom Notice of Consultation CRTC 2019-372-2, April 27, 2020, <https://crtc.gc.ca/eng/archive/2019/2019-372-2.htm>.

¹⁰ CRTC, “Broadband Fund – Projects selected for funding,” <https://crtc.gc.ca/eng/internet/select.htm>, updated to March 19, 2021.

¹¹ “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.

¹² Canadian Radio-television and Telecommunications Commission, Telecom Order CRTC 2016-396, October 6, 2016, <https://crtc.gc.ca/eng/archive/2016/2016-396.htm>.

¹³ From the 2011 census. See Statistics Canada data at <https://www12.statcan.gc.ca/census-recensement/index-eng.cfm>, accessed March 20, 2017.

United States.¹⁴ While providing “reliable and affordable telecommunications services of high quality” to rural areas is enshrined in law,¹⁵ 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 2020 figures.¹⁶ Major ISPs generally offer services with bandwidth caps, resulting 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 2020 Communications Monitoring Report, household broadband service with speeds between 5 Mbps and 9.99 Mbps was available in 100 percent of urban areas, compared to 98.5 percent in rural areas (a small increase from the 98 percent rural rate the previous year). However, the 98 percent figure includes 7 percent of households where availability was only via wireless services, which are generally more expensive, especially as data usage rates increase.¹⁷ When considering the CRTC’s high-quality service definitions, the urban-rural divide is significantly more pronounced: 50 Mbps service is available to 98.6 percent of urban households but only 45.6 percent of rural households.¹⁸

The government has generally taken a patchwork approach to improving connectivity in remote communities, indicating a lack of a strong overall strategy, though this may be changing. The 2019 budget took a more proactive approach than the previous year, with the government pledging to spend C\$5 billion (\$3.8 billion) to C\$6 billion (\$4.5 billion) to improve rural broadband services over 10 years.¹⁹ The 2020 budget was never presented due to the COVID-19 pandemic, with Canada’s first budget in two years scheduled presented on April 19, 2021.²⁰ The new budget included an additional one billion Canadian dollars that will in part go to improve rural and remote broadband access.²¹

The urban-rural divide has only intensified during the pandemic,²² and a proposed merger between two of Canada’s largest telecommunications companies (see A4) is also expected to intensify the divide.²³ At least reports indicate the government may accelerate its broadband access plan, particularly in rural areas, as part of Canada’s pandemic response,²⁴ though rural communities continue to call on the government to increase and speed up their efforts.²⁵ This is reflected to a degree in the new budget, as now \$2.75 billion of the Universal Broadband Fund’s total of \$7.2 billion is targeted to be used to improve access in rural and remote communities.

There is also a significant access gap in terms of income: as of 2018, the penetration rate for

¹⁴ National Geographic “Canada Facts,” accessed March 20, 2017,

<https://web.archive.org/web/20170606011821/http://travel.nationalgeographic.com/travel/countries/canada-facts/>.

¹⁵ *Telecommunications Act*, S.C. 1993, c.38, section 7(b), <https://laws-lois.justice.gc.ca/eng/acts/T-3.4/FullText.html>.

¹⁶ Canadian Radio-television and Telecommunications Commission, “Communications Monitoring Report 2020,” December 2020, “2019 Year-End Monthly Prices for Internet, Mobile, Landline and TV services,” <https://crtc.gc.ca/eng/publications/reports/policyMonitoring/2020/cmr5.htm>.

¹⁷ “LTE and Broadband Availability”, supra note 1 at Figure 4.8.

¹⁸ “LTE and Broadband Availability”, supra note 1 at Infographic 4.4.

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

²⁰ Government of Canada, “Budget 2021 - A Recovery Plan for Jobs, Growth, and Resilience,” April 19, 2021, available at <https://www.budget.gc.ca/2021/home-accueil-en.html>.

²¹ David Paddon, “Ottawa adds \$1B to broadband fund for rural, remote communities,” April 19, 2021, CTV News, <https://www.ctvnews.ca/politics/ottawa-adds-1b-to-broadband-fund-for-rural-remote-communities-1.5393610>.

²² See e.g. Kirk Starrat, “Digital divide: Gap between Canada’s rural, urban internet speeds widens during COVID-19,” *The Chronicle Herald*, August 14, 2021, <https://www.thechronicleherald.ca/news/provincial/digital-divide-gap-between-canadas-rural-urban-internet-speeds-widens-during-covid-19-485368/>.

²³ “Critics of Rogers-Shaw merger say government must mandate affordable internet in remote areas,” *CBC News*, March 21, 2021, <https://www.cbc.ca/radio/checkup/are-you-satisfied-with-the-price-and-speed-of-your-internet-and-cell-phone-service-1.5955613/critics-of-rogers-shaw-merger-say-government-must-mandate-affordable-internet-in-remote-areas-1.5957779>.

²⁵ See e.g. Olivia Bowden “Help us out of internet ‘Dark Age,’ rural municipalities plead,” *CBC News*, August 20, 2020, <https://www.cbc.ca/news/canada/ottawa/eastern-ontario-poor-internet-pandemic-1.5691927>.

home internet access for the highest income quartile was 99.6 percent, while the penetration rate for the lowest income quartile was only 80.9 percent.²⁶

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.

	2019	2020	2021
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 could theoretically 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.

	2019	2020	2021
A4: Are there legal, regulatory, or economic obstacles that restrict the diversity of service providers? (0–6 points)	5	5	5

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. The last available data showed that Canadian retail telecommunications revenue (comprised of wireline, wireless, internet, and data and private lines) totalled C\$54.1 billion (US\$43 billion) in 2019, a 2.0 percent increase over the previous year.²⁷ The five largest companies (Bell, Québecor, Rogers, Shaw, and TELUS) accounted for 87.3 percent of total revenue, virtually the same as the previous year.²⁸

The telecommunications market in Canada threatens to become even more concentrated as regulators are currently evaluating a potential merger of two of the five largest companies, Rogers and Shaw.²⁹ If approved, this will lead to less competition and higher prices for Canadians.³⁰

The growth in the market for internet service outpaces that of the ICT market generally. According to the CRTC's 2020 Communications Monitoring Report, revenue for the fixed retail internet services sector stood at C\$12.8 billion (US\$10.2 billion) in 2019, a 9 percent increase over 2018,³¹

²⁶ Statistics Canada, "Use of Internet services and technologies by age group and household income quartile," Table 22-10-0113-01, accessed March 28, 2021, https://www150.statcan.gc.ca/t1/tbl1/en/cv.action?pid=2210011301&request_locale=en.

²⁷ Canadian Radio-television and Telecommunications Commission, Communications Monitoring Report 2020, "Highlights of the Telecommunications Sector," <https://crtc.gc.ca/eng/publications/reports/policyMonitoring/2020/cmr2.htm>, Infographic 2.1

²⁸ *Ibid*, table 2.1.

²⁹ Dwayne Winseck, "Rogers' bid for Shaw is bad news for competition in several media markets, and should be blocked," The Toronto Star, March 19, 2021, <https://www.thestar.com/opinion/contributors/2021/03/19/rogers-bid-for-shaw-is-bad-news-for-competition-in-several-media-markets-and-should-be-blocked.html>.

³⁰ Michael Geist, "Higher Prices, Less Competition: Some Reflections on the Proposed Rogers – Shaw Merger," March 16, 2021, <https://www.michaelgeist.ca/2021/03/higher-prices-less-competition/>.

³¹ *Supra* note 29 ("Highlights of the Telecommunications Sector"), Infographic 2.7.

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, some providers are restricted to urban areas, and the possible merger of Rogers and Shaw threatens such choice in many markets. 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.

Three mobile service providers dominate the market, with Bell, TELUS, and Rogers serving 90.2 percent of wireless subscribers.³² Their market share has remained relatively steady over the years. These companies are also leaders in the provision of fixed-line internet service (via phone lines or cable), along with Shaw, Cogeco, and Vidéotron, which is owned by Québecor. While Canadians generally enjoy a choice of fixed-line internet providers, the available choices vary from region to region, and the possible merger of Rogers and Shaw would limit consumers' options in many markets. There is often 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 Canada's wireless prices continue to be rated amongst the highest in the world.³³ The government has taken action however, forcing the three largest wireless companies (Bell, TELUS, and Rogers) to lower their prices by 25% over the next two years.³⁴

	2019	2020	2021
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 largely operates independently of 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 refrain from internet-content regulation dates to 1999 and has been reinforced on numerous occasions since,³⁵ including by the Supreme Court of Canada (SCC).³⁶ 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. Amendments to Canada's *Broadcasting Act* proposed during the coverage period³⁷ threaten to dramatically alter Canada's media landscape by allowing for regulation of the internet and its content in new ways, effectively discarding the new media exemption.³⁸

³² Ibid, Figure 2.12. .

³³ Marc Montgomery, "Canada: where wireless is among the world's most expensive," *Radio-Canada International*, November 4, 2020, <https://www.rcinet.ca/en/2020/11/04/canada-where-wireless-is-among-the-worlds-most-expensive/>.

³⁴ David Thurton, "Liberals give big 3 wireless providers two years to cut prices by 25 per cent," *CBC News*, March 5, 2020, <https://www.cbc.ca/news/politics/wireless-cellphone-fees-1.5484080>.

³⁵ *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>.

³⁶ "Reference re Broadcasting Act, 2012 SCC 4," February 9, 2012, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/7989/index.do>

³⁷ Bill C-10, *An Act to amend the Broadcasting Act and to make related and consequential amendments to other Acts*, first reading November 3, 2020, available at <https://parl.ca/DocumentViewer/en/43-2/bill/C-10/first-reading>.

³⁸ See e.g. Michal Kasprovicz et al, "Canadian Government introduces legislation that would fundamentally transform the broadcasting system," DLA Piper, November 25, 2020, <https://www.dlapiper.com/en/us/insights/publications/2020/11/canadian-government-introduces-legislation-to-amend-broadcasting-act/>; Michael Geist, *The Broadcasting Act Blunder, Day 3: Minister Guilbeault Says Bill C-10 Contains Economic Thresholds That Limit Internet Regulation. It Doesn't*, November 23, 2020, <https://www.michaelgeist.ca/2020/11/the-broadcasting-act-blunder-day-three-minister-guilbeault-says-bill-c-10-contains-economic-thresholds-that-limit-internet-regulation-it-doesnt/>.

B. Limits on Content

A Canadian court ordered ISPs to block websites involved in illegally distributing copyrighted content for the first time ever. One ISP, TekSavvy, appealed the decision on several grounds, including freedom of speech. Amendments to the notice-and-notice regime of the Copyright Act made in December 2018 continue to protect users by placing significant restrictions on what can be included in copyright infringement notices.

	2019	2020	2021
B1: Does the state block or filter, or compel service providers to block or filter, internet content, particularly those protected by international human rights standards? (0–6 points)	6	5	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 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 petitioned the Federal Court in *Bell Media Inc. v. GoldTV.Biz* to order the domains’ blocking for rebroadcasting their programming without permission. The court, holding that the plaintiffs would suffer irreparable harm, granted an injunction ordering ISPs to block users’ access to the websites via domain name system (DNS) and internet protocol (IP) blocking. Twelve domains and subdomains were blocked under the order, which permitted the media companies to seek to further blocking orders for websites infringing on their programming.³⁹ The decision was appealed by ISP TekSavvy, and in a preliminary ruling in June 2020, the court granted intervening status to six different interested groups.⁴⁰ Oral arguments took place in March 2021, with TekSavvy arguing that the lower court did not have jurisdiction and the order violates freedom of expression as protected by the Canadian Charter of Rights and Freedoms.⁴¹ In a May 2021 decision, the Federal Court of Appeal rejected TekSavvy’s appeal, with the Court concluding that the lower court judge did indeed have the authority to grant site-blocking orders, and that the lower court judge made no errors in his constitutional analysis.⁴² The Court of Appeal noted that the names and number of websites being blocked would always be evolving as the defendants would simply change URLs, but that this was not an impediment to issuing site-blocking orders as the orders could simply be updated.

Previously, in January 2018, a group of over 25 ISPs, media companies, creative companies, and other interested parties—including major entities like Bell, Rogers, and the Canadian Broadcasting Corporation (CBC)—banded together as “FairPlay Canada”⁴³ 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.”⁴⁴ Some commentators criticized the plan for possibly violating Canada’s net neutrality regime and for the potential to affect websites that did not engage in piracy.⁴⁵ Other commentators insisted it

³⁹ 2019 FC 1432, November 15, 2019, <https://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/424753/index.do>.

⁴⁰ *Teksavvy Solutions Inc. v. Bell Media Inc.*, 2020 FCA 108, <https://decisions.fca-caf.gc.ca/fca-caf/decisions/en/item/481591/index.do>.

⁴¹ Zena Olijnyk, “TekSavvy lawyers argue Federal Court of Canada erred in ordering ISPs to block certain websites,” *Canadian Lawyer Mag*, March 24, 2021, <https://www.canadianlawyermag.com/practice-areas/litigation/teksavvy-lawyers-argue-federal-court-of-canada-erred-in-ordering-isps-to-block-certain-websites/354270>.

⁴² *Teksavvy Solutions Inc. v. Bell Media Inc.*, 2021 FCA 100, <https://decisions.fca-caf.gc.ca/fca-caf/decisions/en/item/497659/index.do>.

⁴³ FairPlay Canada home page, <https://www.fairplaycanada.com/>.

⁴⁴ 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, https://assets.corusent.com/wp-content/uploads/2018/02/FairPlay_Canada_CRTC_Report_2018.pdf.

⁴⁵ Michael Geist, “The Case Against the Bell Coalition’s Website Blocking Plan,” February 2018, <http://www.michaelgeist.ca/2018/02/case-bell-coalitions-website-blocking-plan-part-1-canadas-current-copyright-law-provides-effective-anti-piracy-tools/>

was a necessary tool to fight online piracy and protect copyright.⁴⁶ Ultimately, the CRTC rejected the proposal in October 2018 after determining that it lacked jurisdiction to implement the plan. However, the CRTC invited Parliament to examine the issue,⁴⁷ and there have been mixed messages. While a recent government report recommended the “Government of Canada increase its efforts to combat piracy,”⁴⁸ another report explicitly rejected the FairPlay approach, stating it was up to the courts to decide if websites should be blocked.⁴⁹

In January 2021, the CRTC launched a public consultation “to strengthen Canadians’ online safety” by blocking certain sites infected with botnets,⁵⁰ but this plan has come under fire by commentators.⁵¹ The submissions to the consultation process from a broad range of industry actors almost universally opposed the plan.⁵²

	2019	2020	2021
B2: Do state or nonstate actors employ legal, administrative, or other means to force publishers, content hosts, or digital platforms to delete content, particularly those protected by international human rights standards? (0–4 points)	3	3	3

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

The previous notice-and-notice regime 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.⁵³ 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 URL linking to such offers or demands.⁵⁴

⁴⁶ 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/>

⁴⁷ Government of Canada, “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>

⁴⁸ Recommendation #6 in “SHIFTING PARADIGMS: Report of the Standing Committee on Canadian Heritage,” Julie Dabrusin, Chair, May 2019,

<https://www.ourcommons.ca/Content/Committee/421/CHPC/Reports/RP10481650/chpcrp19/chpcrp19-e.pdf>.

⁴⁹ See Michael Geist, “The Authoritative Canadian Copyright Review: Industry Committee Issues Balanced, Forward-Looking Report on the Future of Canadian Copyright Law,” June 3, 2019, <https://www.michaelgeist.ca/2019/06/the-authoritative-canadian-copyright-review-report-industry-committee/>.

⁵⁰ “CRTC launches consultation to strengthen Canadians’ online safety,” CRTC News Release, January 13, 2021, <https://www.canada.ca/en/radio-television-telecommunications/news/2021/01/crtc-launches-consultation-to-strengthen-canadians-online-safety.html>.

⁵¹ See e.g. Michael Geist, “Blocking is Back: Why Internet Blocking is the Next Big Canadian Policy Battle,” March 17, 2021, <https://www.michaelgeist.ca/2021/03/blocking-is-back/>. See also Dave Naylor, “Feds blasted for plans to block entire websites for safety reasons,” March 25, 2021, Western Standard Online, <https://westernstandardonline.com/2021/03/feds-blasted-for-plans-to-block-entire-websites-for-safety-reasons/>.

⁵² Howard Solomon, “Canada’s big carriers, ISPs turn thumbs down on proposed mandatory botnet-fighting regime,” March 17, 2021, IT World Canada, <https://www.itworldcanada.com/article/canadas-big-carriers-isps-turn-thumbs-down-on-proposed-mandatory-botnet-fighting-regime/444050>.

⁵³ 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-rights-holder-abuse-its-copyright-notice-system>

⁵⁴ “Bill C-86, Budget Implementation Act, 2018, No. 2, amending the *Copyright Act*,” December 13, 2018, <https://www.parl.ca/LegisInfo/BillDetails.aspx?Language=E&billId=10127729>.

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.⁵⁵ In November 2019, a group of media companies sought and obtained an order forcing ISPs to block certain websites that hosted copyright-infringing content which was subsequently upheld by the Court of Appeal (see B1). The efforts continued during this coverage period, with a cable TV channel seeking an injunction to block large retail chains from selling set-top streaming boxes which could be reprogrammed to stream pirated content.⁵⁶

In 2017, the SCC upheld the decision by the British Columbia Court of Appeals in *Google, Inc. v. Equustek Solutions, Inc.*,⁵⁷ ordering Google to remove URLs in its global index pointing to websites that infringed on the plaintiffs' trademark (see B3).

Defamation claims may also result in content removal, 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 not to post anything about the plaintiff, as well as awarding damages.⁵⁸ 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.⁵⁹ In 2021 a British Columbia court used the reasoning in that case to come to the opposite conclusion, that a defamation case against Twitter could proceed in Canada.⁶⁰ Furthermore, an Ontario court took defamation one step further when it recognized a common law tort of "internet harassment" to address the defendant's online conduct and publications, which went beyond defamation (see C2).⁶¹

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.⁶² The provincial government has not yet moved forward with the proposed reform.

In Quebec, Canada's French-speaking province, websites that are commercial in nature are legally required to be in French,⁶³ 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 their sites down 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.⁶⁴

⁵⁵ "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>.

⁵⁶ Johnny Wakefield, "Pirate devices': Edmonton TV company seeks injunction blocking Best Buy, other retailers from selling streaming boxes," March 4, 2021, Edmonton Journal, <https://edmontonjournal.com/news/local-news/pirate-devices-edmonton-tv-company-seeks-injunction-blocking-best-buy-other-retailers-from-selling-streaming-boxes>.

⁵⁷ "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>.

⁵⁸ "Nazeralli v. Mitchell, 2018 BCCA 104," March 19, 2018, <https://www.canlii.org/en/bc/bcca/doc/2018/2018bcc104/2018bcc104.html>

⁵⁹ "Haaretz.com, et al. v. Mitchell Goldhar, SCC," January 1, 2019, <https://www.scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=37202>; See also: "Appeal from the decision of the Court of Appeal for Ontario, 2016 ONCA 515," June 28, 2016, <https://www.canlii.org/en/on/onca/doc/2016/2016onca515/2016onca515.html?autocompleteStr=haaretz&autocompletePos=2>.

⁶⁰ *Giustra v. Twitter, Inc.*, 2021 BCSC 54, January 14, 2021, <https://www.canlii.org/en/bc/bcsc/doc/2021/2021bcsc54/2021bcsc54.html>.

⁶¹ *Caplan v. Atas*, 2021 ONSC 670, January 28, 2021, <https://www.canlii.org/en/on/onsc/doc/2021/2021onsc670/2021onsc670.html>.

⁶² 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/>.

⁶³ "Charter of the French Language, c. C-11, Article 52," June 1, 2020, <http://legisquebec.gouv.qc.ca/en/ShowDoc/cs/C-11>.

⁶⁴ Elysia Bryan-Baynes, "Quebec language police target English retail websites," November 13, 2014, <https://globalnews.ca/news/1671128/oqlf-targets-english-retail-websites/>.

	2019	2020	2021
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).⁶⁵ Accessing child pornography is illegal in Canada under section 163.1(4.1) of the criminal code,⁶⁶ 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 2016,⁶⁷ but remains inoperative. In July 2018, a Quebec court declared the law unconstitutional, ruling online gambling a federal rather than provincial matter.⁶⁸

In 2004, the SCC ruled that ISPs are not liable for copyright infringement violations committed by their subscribers,⁶⁹ a principle now enshrined in law.⁷⁰ Copyright law includes a notice-and-notice provision, in effect since 2015, which was amended during the previous 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 able to forward the notifications to the implicated subscriber, though a December 2018 amendment to this system no longer requires ISPs to do so. 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.⁷¹

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 left to Parliament or the CRTC,⁷² and that the court relied too heavily on a British decision within a very different legal framework.⁷³ TekSavvy, the only ISP to contest the original decision, appealed later that month based on freedom-of-speech and other concerns, but the Court of Appeal denied the Appeal in May 2019.⁷⁴

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

⁶⁵ Cybertip!ca, "Cleanfeed Canada," <https://www.cybertip.ca/app/en/projects-cleanfeed#projects-cleanfeed>

⁶⁶ Criminal Code, RSC 1985 c C-46 s 163.1(4.1).

⁶⁷ 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/bill74takeeffect/>

⁶⁸ "Canadian Wireless Telecommunications Association c. Attorney General of Quebec, 2018 QCCS 3159 (CANLII) [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=AAAAAQATcHJvamV0IGRlIGxhIGxvaSA3NAAAB&xresultIndex=26>.

⁶⁹ Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn of Internet Providers, [2004] SCC, 2 SCR 427.

⁷⁰ Copyright Act, R.S.C., 1985, c. C-42, section 31.1, July 1, 2020, <https://laws-lois.justice.gc.ca/eng/acts/c-42/FullText.html>.

⁷¹ *Voltage Pictures, LLC v. John Doe*, 2016 FC 881, CanLII, <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; See also: Federal Court Decisions, "Voltage Pictures, LLC Canada v. Salna," November 12, 2019, <https://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/458741/index.do>

⁷² 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/>.

⁷³ Allen Mendelsohn, "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/>.

⁷⁴ *Supra* note 42.

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 United States based on the long-standing principle of Google as an intermediary.⁷⁵ In April 2018, Google took the US 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.⁷⁶ When the case was finally heard on the merits in May 2020, the court awarded significant damages based on copyright violations.⁷⁷

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 URLs would not be removed.⁷⁸

	2019	2020	2021
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, Bill C-51 was recently reformed.(see C5).

	2019	2020	2021
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 a campaign season officially commences.⁷⁹ An internal Elections Canada report completed in late October 2019 found numerous instances of false election information being spread on social media.⁸⁰ Certain provisions of the Election Modernization Act prohibiting misinformation were struck down by an Ontario Court as unconstitutional, because they violated freedom of speech.⁸¹ False information was also spread through social media platforms during the COVID-19 pandemic,

⁷⁵ 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>

⁷⁶ Equustek Solutions Inc. v Jack, 2018 BCSC 610, April 16, 2018, <https://www.canlii.org/en/bc/bcsc/doc/2018/2018bcsc610/2018bcsc610.html>.

⁷⁷ Equustek Solutions Inc. v Jack, 2020 BCSC 793, May 29, 2020, <https://www.canlii.org/en/bc/bcsc/doc/2020/2020bcsc793/2020bcsc793.html>.

⁷⁸ "Crookes v. Newton, 2011 SCC 47," October 19, 2011, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/7963/index.do>.

⁷⁹ 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>; See also: "Elections Modernization Act," December 13, 2018, https://laws-lois.justice.gc.ca/eng/annualstatutes/2018_31/page-1.html.

⁸⁰ 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>.

⁸¹ Elizabeth Thomson, "Law prohibiting election misinformation struck down," CBC News, March 14, 2021, <https://www.cbc.ca/news/politics/elections-misinformation-court-free-speech-1.5948463>. See Canadian Constitution Foundation v. Canada (Attorney General), 2021 ONSC 1224, February 19, 2021, <https://www.canlii.org/en/on/onsc/doc/2021/2021onsc1224/2021onsc1224.html>.

with conspiracy theories gaining traction.⁸² During the coverage period, misinformation about COVID-19 vaccines has spread online.⁸³

	2019	2020	2021
B6: Are there economic, regulatory, or other 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.⁸⁴ With these policies, the CRTC has substantively completed 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.⁸⁵

In January 2020, the government released a detailed report from a legislative review panel on the future of Canada's communications legislation, the result of a review of initiated in its 2017 budget.⁸⁶ Commentators have warned that the report, which focused heavily on content produced in Canada, may herald the weakening of net neutrality.⁸⁷ However, the report itself included a commitment to the net neutrality principle.⁸⁸

The Department of Canadian Heritage, in the wake of its own report, announced a deal with Netflix in 2017, in which the streaming service pledged to spend a minimum of C\$500 million (\$377 million) on Canadian productions over the next five years.⁸⁹ In its January 2020 review, the legislative review panel 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 tax.⁹⁰ As part of the amendments to the Broadcasting Act in Bill C-10 (see A5) and new Federal government economic policy released in November 2020, streaming services would indeed be taxed (at the normal GST or HST rates depending on the province, a range of 5% to 15%), raising significant revenue for the government.⁹¹ The government's budget presented in April 2021 provided for implementation of a "Digital Services Tax" which would tax "large businesses with gross revenue of 750 million

⁸² 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/>.

⁸³ Barbara Ortutay and Amanda Seitz, "Defying rules, anti-vaccine accounts thrive on social media," CTV News, March 12, 2021, <https://www.ctvnews.ca/health/coronavirus/defying-rules-anti-vaccine-accounts-thrive-on-social-media-1.5344498>.

⁸⁴ 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>; See also: *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>.

⁸⁵ House of Commons Canada, "The Protection of Net Neutrality in Canada, Report of the Standing Committee on Access to Information, Privacy and Ethics," May 2018, <https://www.ourcommons.ca/Content/Committee/421/ETHI/Reports/RP9840575/ethirp14/ethirp14-e.pdf>

⁸⁶ Government of Canada, "Innovation, Science and Economic Development Canada: Canada's communications future: Time to act," January 2020, <https://www.ic.gc.ca/eic/site/110.nsf/eng/00012.html>.

⁸⁷ 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/>.

⁸⁸ Government of Canada, "Innovation, Science and Economic Development Canada: Canada's communications future: Time to act," January 2020, <https://www.ic.gc.ca/eic/site/110.nsf/eng/00012.html>.

⁸⁹ 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&>.

⁹⁰ Government of Canada, "Innovation, Science and Economic Development Canada: Canada's communications future: Time to act," January 2020, <https://www.ic.gc.ca/eic/site/110.nsf/eng/00012.html>; See also: 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>.

⁹¹ Canadian Press, "'Netflix tax' could yield \$1.3B in revenue, slightly more than feds' estimate: PBO," Global News, February 10, 2021, <https://globalnews.ca/news/7631862/digital-media-tax-netflix-pbo/>.

euros or more” at a rate of 3 percent starting in 2022; the government predicts this would add \$3.4 billion in revenue over five years.⁹² Numerous provinces including British Columbia, Quebec, and Saskatchewan already levy provincial sales taxes on out-of-province digital platforms, including Netflix, Google, Amazon, and, in Quebec’s case, Spotify.⁹³

	2019	2020	2021
B7: Does the online information landscape lack diversity and reliability? (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. Misinformation surrounding COVID-19 was a significant issue in Canada during the coverage period.⁹⁴

	2019	2020	2021
B8: Do conditions impede users’ ability to mobilize, form communities, and campaign, particularly on political and social issues? (0–6 points)	6	6	6

Digital mobilization tools, including social media platforms and communication apps, are available and are 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’s decision to introduce 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.⁹⁵

Canadians have been especially active in the online #MeToo movement,⁹⁶ which prompted the justice minister to consider updating laws to ensure victims of sexual violence are treated more compassionately in courtrooms.⁹⁷ This online activism also influenced the government to introduce Bill C-65,⁹⁸ which became law in October 2018 and dramatically updated the harassment legal framework as it applies to the federal government and federally regulated workplaces.⁹⁹ Online activism likely played a role in the decision to legalize cannabis nationwide,¹⁰⁰ which went into effect in October 2018. Canadians have also relied on the internet to mobilize in the wake of the COVID-19 pandemic, which made in-person protests more difficult. For example, protesters in Saskatchewan moved their demonstration for a higher-education tuition freeze online in March 2020.¹⁰¹ As the pandemic progressed, the internet helped organize in-person protests once again, around issues ranging from Black Lives

⁹² Government of Canada, “Budget 2021 - A Recovery Plan for Jobs, Growth, and Resilience,” April 19, 2021, chapter 10 section 10.1 at <https://www.budget.gc.ca/2021/report-rapport/p4-en.html#chap10>.

⁹³ “What the new ‘Netflix tax’ means for B.C. users,” CBC News, February 19, 2020, <https://www.cbc.ca/news/canada/british-columbia/new-tax-on-streaming-services-1.5468709>

⁹⁴ Karine Garneau and Clémence Zossou, “Misinformation during the COVID-19 pandemic,” Statistics Canada, February 2, 2021, <https://www150.statcan.gc.ca/n1/pub/45-28-0001/2021001/article/00003-eng.htm>.

⁹⁵ Open Media, <https://openmedia.org/>.

⁹⁶ Adina Bresge, “#MeToo movement prompting sexual-assault survivors to break silence to family,” *National Post*, January 31, 2018, <https://nationalpost.com/pmnn/news-pmnn/canada-news-pmnn/metoo-movement-prompting-sexual-assault-survivors-to-break-silence-to-family>.

⁹⁷ Kate Taylor, “Where to go after #MeToo,” *The Globe and Mail*, December 6, 2017, <https://tgam.ca/2GNPCW1>.

⁹⁸ “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, September 11, 2019, <https://www.parl.ca/LegisInfo/BillDetails.aspx?billId=9220285&Language=E>.

⁹⁹ Parliament of Canada, “Statutes of Canada, Chapter 22,” October 25, 2018, <https://www.parl.ca/DocumentViewer/en/42-1/bill/C-65/royal-assent>.

¹⁰⁰ 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/>

¹⁰¹ 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>.

Matter¹⁰² to protests against mask mandates and other pandemic-related public health measures.¹⁰³

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. 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.

	2019	2010	2021
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.”¹⁰⁴ These protections apply to all forms of speech, whether online or offline. There are a few restrictions that apply to online speech (see C2).

	2019	2020	2021
C2: Are there laws that assign criminal penalties or civil liability for online activities, particularly those protected under international human rights standards? (0–4 points)	2	2	2

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.¹⁰⁵ 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).¹⁰⁶ However, the controversial provision of the CHRA prohibiting online hate speech (s. 13), which was criticized for being

¹⁰² “Canadians hold protests, vigils for black lives lost at the hands of police,” CBC News, June 5, 2020, <https://www.cbc.ca/news/canada/canadian-floyd-anti-racism-rallies-1.5599792>.

¹⁰³ Adam Kovac, “10 arrested, over 140 tickets given as thousands protest in Montreal against pandemic public health measures,” CTV News, March 13, 2021, <https://montreal.ctvnews.ca/10-arrested-over-140-tickets-given-as-thousands-protest-in-montreal-against-pandemic-public-health-measures-1.5346328>.

¹⁰⁴ “Constitution Act, Canadian Charter of Rights and Freedoms,” 1982, <https://laws-lois.justice.gc.ca/eng/const/page-15.html>.

¹⁰⁵ R.S.C 1985 c. C-46, <https://laws-lois.justice.gc.ca/eng/acts/C-46/FullText.html>.

¹⁰⁶ R.S.C., 1985, c. H-6, <https://laws-lois.justice.gc.ca/eng/acts/H-6/FullText.html>.

overly broad, was repealed in 2013.¹⁰⁷ In early 2018, the Liberal government considered reviving the provision in some form,¹⁰⁸ but the idea did not progress.

In January 2021, an Ontario court took expanded the definition of defamation one step further when it recognized a common law tort of “internet harassment” to address the defendant’s online conduct and publications in *Caplan v. Atas*. (see B2 and C2) In this case, the court defined “internet harassment” as “serial publications of defamatory material,” which are used to “harass, harr, and molest” the victim.¹⁰⁹

Antispam legislation enacted in 2014 requires opt-in consent to send commercial electronic messages. Critics of the legislation have argued that it is overly broad and overregulates commercial speech. After the Federal Court of Appeals upheld the constitutionality of the law in 2020,¹¹⁰ in March 2021, the SCC refused to hear an appeal, effectively ending any constitutional challenge.¹¹¹

	2019	2020	2021
C3: Are individuals penalized for online activities, particularly those protected under international human rights standards? (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, though courts have recently increased awards in online defamation cases.

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, or rises to the level of harassment, which is both a criminal offense¹¹² and now an actionable civil tort in Canada (see B2 and C2).

Canadian courts take a proactive approach when hearing online defamation cases, and are increasingly willing to grant large monetary awards in some cases. In September 2019, a British Columbia court issued C\$200,000 (\$150,000) in damages.¹¹³ In January 2018, the Court of Appeal of Ontario upheld a C\$700,000 (\$520,000) judgment issued in 2016.¹¹⁴ In January 2020, an Ontario judge issued significant awards for defamation against anonymous online defendants for only the second time in Canadian legal history.¹¹⁵ When one anonymous defendant finally came forward, he was unable to get the original judgment against him thrown out, as he admitted to receiving service emails from plaintiff, and the Court saw the defendant’s dismissal as a conscious decision not to participate in the proceedings, and he had essentially concealed his identity.¹¹⁶

¹⁰⁷ Parliament of Canada, “Bill C-304, An Act to amend the Canadian Human Rights Act (protecting freedom), S.C. 2013, c. 37,” September 13, 2013, <https://www.parl.ca/LegisInfo/BillDetails.aspx?billId=5124394&Language=E&Mode=1>.

¹⁰⁸ Brain Platt, “Liberals reviewing option to revive controversial internet hate speech law repealed in 2013,” *National Post*, January 23 2018, <https://nationalpost.com/news/politics/liberals-reviewing-option-to-revive-controversial-hate-speech-law-repealed-in-2013>.

¹⁰⁹ *Caplan v. Atas*, 2021 ONSC 670, January 28, 2021, <https://www.canlii.org/en/on/onsc/doc/2021/2021onsc670/2021onsc670.html>.

¹¹⁰ *3510395 Canada Inc. v. Canada (Attorney General)*, 2020 FCA 103, June 5, 2020, <https://www.canlii.org/en/ca/fca/doc/2020/2020fca103/2020fca103.html>.

¹¹¹ Barry Sookman, “Supreme Court denies CompuFINDER leave to appeal in CASL Charter and constitutional challenge,” March 4, 2021, <https://www.barrysookman.com/2021/03/04/supreme-court-denies-compufinder-leave-to-appeal-in-casl-charter-and-constitutional-challenge/>.

¹¹² Criminal Code, R.S.C., 1985, c. C-46, section 264, <https://laws-lois.justice.gc.ca/eng/acts/c-46/FullText.html>.

¹¹³ *Rook v. Halcrow*, 2019 BCSC 2253,” September 25, 2019, <https://www.bccourts.ca/jdb-txt/sc/19/22/2019BCSC2253.htm>.

¹¹⁴ *Rutman v. Rabinowitz*, 2018 ONCA 80,” CANLII, January 31, 2018, <https://www.canlii.org/en/on/onca/doc/2018/2018onca80/2018onca80.html>.

¹¹⁵ *Theralase Technologies Inc. v. Lanter*, 2020 ONSC 205,” CANLII, January 13, 2020, <https://www.canlii.org/en/on/onsc/doc/2020/2020onsc205/2020onsc205.html>.

¹¹⁶ *Theralase Technologies Inc. v Lanter*, 2021 ONSC 943, February 5, 2021, <https://www.canlii.org/en/on/onsc/doc/2021/2021onsc943/2021onsc943.html>.

	2019	2020	2021
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.¹¹⁷ The comments followed a July 2019 communiqué, and preceded an October 2019 communiqué, from ministers in the “Five Eyes alliance”—five countries that maintain an intelligence operations agreement, including Canada—that criticized technology companies for providing encrypted products and limiting law enforcement access to those products.¹¹⁸

	2019	2020	2021
C5: Does state surveillance of internet activities infringe on users’ right to privacy? (0–6 points)	3	4	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 permitted 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 have subsequently materialized, most recently with Bill C-59.

Bill C-59, an Act Respecting National Security Matters,¹¹⁹ was introduced in June 2017 to address some of the more problematic provisions of the Anti-Terrorism Act,¹²⁰ and was passed in June 2019.¹²¹ The law limits the broad criminal-speech provisions originally seen in Bill C-51. Bill C-59 is also meant to enhance parliamentary oversight through the creation of a National Security and Intelligence Review Agency and an Office of the Intelligence Commissioner.¹²² Bill C-59 still allows the government to engage in cyberoperations, but its powers to do so are more limited than in Bill C-51.¹²³ Civil society groups raised concerns that Bill C-59 does not fully address surveillance issues posed by the previous legislation,¹²⁴ and still grants too much power to the government, including the ability to engage in mass data collection.¹²⁵ In February 2021, judges began hearing related cases, and have put limits on the government’s intelligence agency (CSIS) and its ability to spy in foreign countries.¹²⁶

¹¹⁷ Stuart Thomson, “We’re closer to the knife’s edge: Confrontation looming on encryption ‘backdoors’ as Goodale looks for balance,” National Post, August 7, 2019, <https://nationalpost.com/news/politics/were-closer-to-the-knives-edge-confrontation-looming-on-encryption-backdoors-as-goodale-looks-for-balance>

¹¹⁸ “Joint meeting of Five Country Ministerial and quintet of Attorneys-General: communiqué, London 2019,” gov.uk, 2019, <https://www.gov.uk/government/publications/five-country-ministerial-communique/joint-meeting-of-five-country-ministerial-and-quintet-of-attorneys-general-communique-london-2019>; See also: “Joint Meeting of FCM and Quintet of Attorneys-General,” 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

¹¹⁹ House of Commons of Canada, “1st session, 42nd Parl.,” June 20, 2017, <https://www.parl.ca/DocumentViewer/en/42-1/bill/C-59/first-reading>.

¹²⁰ Craig Forcese and Kent Roach, “The roses and the thorns of Canada’s new national security bill,” Maclean’s, June 20, 2017, <https://www.macleans.ca/politics/ottawa/the-roses-and-thorns-of-canadas-new-national-security-bill/>.

¹²¹ 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>

¹²² 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>; See also: International Civil Liberties Monitoring Group, “Bill C-59: Changes to C-51,” January 2020, <https://iclmg.ca/issues/bill-c-59-the-national-security-act-of-2017/bill-c-59s-changes-to-c-51/>; See also: 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/>

¹²³ Victoria Henry, “C-59: A Promise Not Kept,” OpenMedia, July 11, 2019, <https://openmedia.org/en/c-59-promise-not-kept>

¹²⁴ Canadian Civil Liberties Association, “Read CCLA’s Submissions on Bill C-59,” January 19, 2018, <https://ccla.org/read-cclas-submissions-bill-c-59/>

¹²⁵ 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/>; See also: Victoria Henry, “C-59: A Promise Not Kept,” OpenMedia, July 11, 2019, <https://openmedia.org/en/c-59-promise-not-kept>

¹²⁶ Jim Bronskill, “Judge denies CSIS request to collect foreign intelligence,” CTV News, February 3, 2021, <https://www.ctvnews.ca/politics/judge-denies-csis-request-to-collect-foreign-intelligence-1.5294826>.

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,¹²⁷ 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 protections against unreasonable search or seizure, which are often interpreted as a right to privacy.¹²⁸ An OPC report released in December 2019 called for Parliament to legislate a right to privacy and affirm a human rights-based approach to federal privacy legislation.¹²⁹ That same month, Prime Minister Trudeau instructed the attorney general and justice minister to strengthen online rights.¹³⁰

In November 2020, the government introduced a massive overhaul of Canadian privacy law in the form of Bill C-11.¹³¹ The Bill creates a new Consumer Privacy Protection Act ("CPPA") which indeed strengthens online rights for individuals; at the same time, it grants additional rights to businesses to use individuals' personal information. The CPPA falls well short of affirming privacy as a human right or using a human rights-based approach, which has been criticized by many commentators.¹³²

The SCC has also expanded privacy rights relating to technology. Most recently, in December 2018, the court ruled that privacy rights are still protected when a computer is shared with others.¹³³ 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.¹³⁴ 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.¹³⁵ On the other hand, sometimes the Supreme Court does not find a reasonable expectation of privacy on the internet in more egregious circumstances, for example in exchanges of Facebook messages and emails in relation to a police sting regarding the criminal luring of minors.¹³⁶

The COVID-19 pandemic has provided authorities the opportunity to erode privacy rights. For example, the Ontario government's April 2020 emergency order allowed it to share personal information in their possession with emergency response personnel, including police officers and paramedics.¹³⁷ In August 2020, Ontario ended police access to the information following a lawsuit from human rights organizations.¹³⁸ The OPC's Annual Report released in October 2020 centred on the need for heightened privacy during the pandemic and reform of privacy laws as

¹²⁷ "R.S.C., 1985, c. P-21," August 28, 2019, <https://laws-lois.justice.gc.ca/eng/acts/P-21/index.html>

¹²⁸ "Canadian Charter of Rights and Freedoms," 1982, <https://laws-lois.justice.gc.ca/eng/const/page-15.html>.

¹²⁹ 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.

¹³⁰ Honorable 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>.

¹³¹ House of Commons of Canada, Bill C-11, An Act to enact the Consumer Privacy Protection Act and the Personal Information and Data Protection Tribunal Act and to make consequential and related amendments to other Acts, First Reading November 17, 2020, <https://parl.ca/DocumentViewer/en/43-2/bill/C-11/first-reading>.

¹³² See e.g. Allen Mendelsohn, "OK OK, here's your post about Bill C-11: what's *not* in the Bill," December 15, 2020, <http://allenmendelsohn.com/2020/12/whats-not-in-bill-c11/>.

¹³³ "R. v. Reeves, 2018 SCC 56," December 13, 2018, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/17405/index.do>.

¹³⁴ "R. v. Marakah, 2017 SCC 59," December 8, 2017, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/16896/index.do>.

¹³⁵ "R. v. Jones, 2017 SCC 60," December 8, 2017, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/16897/index.do>.

¹³⁶ R v. Mills, 2019 SCC 22, April 18, 2019, <https://www.canlii.org/en/ca/scc/doc/2019/2019scc22/2019scc22.html>.

¹³⁷ 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/>.

¹³⁸ "Ontario ends police access to COVID-19 database after legal challenge," CBC News, August 17, 2020, <https://www.cbc.ca/news/canada/toronto/covid-ont-police-database-1.5690220>

a result.¹³⁹ On the other hand, privacy concerns about the government's COVID-19 tracing app were minimized, as privacy watchdogs found little reason for concern.¹⁴⁰

	2019	2020	2021
C6: Does monitoring and collection of user data by service providers and other technology companies infringe on users' right to privacy? (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 the Privacy Commissioner oversee compliance with the private-sector privacy law,¹⁴¹ the Personal Information Protection and Electronic Documents Act (PIPEDA).¹⁴² PIPEDA was modified by the Digital Privacy Act,¹⁴³ 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 2018.¹⁴⁴ PIPEDA, however, remains relatively toothless. The new CPPA bill (see C5) which would replace PIPEDA, has significant fines and penalties on the order of those found in the GDPR.

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),¹⁴⁵ as did the government's January 2020 report on legislative reform of the communications sector.¹⁴⁶ This would generally be achieved under the new CPPA (see C5).

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.¹⁴⁷ There was no progress on this reform during the coverage period.

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.¹⁴⁸ Commentators questioned the OPC's conclusions and reasoning.¹⁴⁹ In October 2018, the OPC

¹³⁹ OPC, "Privacy in a pandemic: 2019-2020 Annual Report to Parliament on the Privacy Act and Personal Information Protection and Electronic Documents Act," https://www.priv.gc.ca/en/opc-actions-and-decisions/ar_index/201920/ar_201920/ (the "2019-2020 OPC Report").

¹⁴⁰ Alexandra Mae Jones, "Canadian privacy watchdogs support COVID-19 exposure app," CTV News, August 3, 2020, <https://www.ctvnews.ca/health/coronavirus/canadian-privacy-watchdogs-support-covid-19-exposure-app-1.5049847>.

¹⁴¹ Office of the Privacy Commissioner of Canada, "About the OPC," September 14, 2016, <https://web.archive.org/web/20170330201210/https://www.priv.gc.ca/en/about-the-opc/>.

¹⁴² "Personal Information Protection and Electronic Documents Act (PIPEDA), S.C. 2000, c. 5," June 21, 2019, <https://laws-lois.justice.gc.ca/eng/acts/P-8.6/index.html>.

¹⁴³ "Digital Privacy Act, S.C. 2015, c. 32," June 18, 2015, https://laws-lois.justice.gc.ca/eng/annualstatutes/2015_32/page-1.html.

¹⁴⁴ Government of Canada, "Breach of Security Safeguards Regulations, published in the Canada Gazette SOR/2018-64, Part II," March 27, 2018, <http://www.gazette.gc.ca/rp-pr/p2/2018/2018-04-18/html/sor-dors64-eng.html>.

¹⁴⁵ "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, "Privacy! Privacy! Privacy!," March 28, 2018, <http://allenmendelsohn.com/2018/03/privacy-privacy-privacy/>.

¹⁴⁶ Government of Canada, "Innovation, Science and Economic Development Canada: Canada's communications future: Time to act," January 2020, <https://www.ic.gc.ca/eic/site/110.nsf/eng/00012.html>

¹⁴⁷ 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>

¹⁴⁸ Office of the Privacy Commissioner of Canada, "Draft OPC Position on Online Reputation," 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/.

¹⁴⁹ Michael Geist, "Why the Canadian Privacy Commissioner's Proposed Right to be Forgotten Creates More Problems Than it Solves," January 29, 2018, <http://www.michaelgeist.ca/2018/01/privacycommishrtbf/>; See also: Allen Mendelsohn, "Surprise! Canada has had a Right To Be Forgotten all along!," January 30, 2018, <http://allenmendelsohn.com/2018/01/surprise-canada-has-had-a-right-to-be-forgotten-all-along/>

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.¹⁵⁰ The case continues to drag on, and it remains unclear when the Federal Court will issue its decision,¹⁵¹ and the OPC has stated it will not alter its position until the Federal Court rules.¹⁵² The ETHI report called for the right to be forgotten to be included in future PIPEDA amendments. In December 2019, Prime Minister Trudeau¹⁵³ and the Privacy Commissioner¹⁵⁴ both called for reform to Canada's privacy laws, including the right to be forgotten. The proposed CPPA (see C5), however, does not contain a true European-style right to be forgotten.

The OPC conducts investigations into major data breaches and other matters 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.¹⁵⁵ In the OPC's investigation into the Cambridge Analytica scandal, Facebook refused to take significant corrective measures or implement the OPC's recommendations.¹⁵⁶ In May 2019, Facebook CEO Mark Zuckerberg and COO Sheryl Sandberg ignored a subpoena from a parliamentary committee to testify on the scandal.¹⁵⁷ In February 2020, the OPC filed an application with the Federal Court seeking a declaration that Facebook violated PIPEDA and orders requiring Facebook to take corrective action,¹⁵⁸ which continues to proceed through the court though a final decision is far from being rendered.¹⁵⁹

During the coverage period the OPC turned its attention to facial recognition technology, finding that the practices of an owner of major shopping centres¹⁶⁰ and facial recognition software company Clearview AI¹⁶¹ violated individuals' data privacy rights under PIPEDA.

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.¹⁶² 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.¹⁶³ 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

¹⁵⁰ OPC, "Privacy Commissioner seeks Federal Court determination on key issue for Canadians' online reputation," October 10, 2018, https://www.priv.gc.ca/en/opc-news/news-and-announcements/2018/an_181010/.

¹⁵¹ See Federal Court Case Information, file number T-1779-18, <https://www.fct-cf.gc.ca/en/court-files-and-decisions/court-files>.

¹⁵² See the 2019-2020 OPC Report, *supra* note 145.

¹⁵³ 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>.

¹⁵⁴ 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.

¹⁵⁵ 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/>.

¹⁵⁶ 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/>.

¹⁵⁷ 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/facebooks-zuckerberg-and-sandberg-named-in-unprecedented-summons-issued-by-mps.html>.

¹⁵⁸ 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/.

¹⁵⁹ See case information T-190-20 and T-473-20 at <https://www.fct-cf.gc.ca/en/court-files-and-decisions/court-files#cont>; see also the 2019-2020 OPC Report, *supra* note 145.

¹⁶⁰ PIPEDA Report of Findings #2020-004, October 28, 2020, <https://www.priv.gc.ca/en/opc-actions-and-decisions/investigations/investigations-into-businesses/2020/pipeda-2020-004/>.

¹⁶¹ PIPEDA Report of Findings #2021-001, February 2, 2021, <https://www.priv.gc.ca/en/opc-actions-and-decisions/investigations/investigations-into-businesses/2021/pipeda-2021-001/>.

¹⁶² "Douez v. Facebook, Inc., 2017 SCC 33," June 23, 2017, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/16700/index.do>.

¹⁶³ "Demers c. Yahoo! Inc., 2017 QCCS 4154," CANLII, September 19, 2017, <https://www.canlii.org/en/qc/qccs/doc/2017/2017qccs4154/2017qccs4154.html>.

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,¹⁶⁴ and the court ordered the website to pay damages to the plaintiff.

	2019	2020	2021
C7: Are individuals subject to extralegal intimidation or physical violence by state authorities or any other actor in relation to 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.¹⁶⁵ A 2016 study found that a quarter of Canadians have been subjected to some form of online harassment,¹⁶⁶ while a 2018 report indicated that a third of Canadian parents know a child in their community who experienced cyberbullying,¹⁶⁷ and a 2020 survey found that 62 percent of Canadian women aged 15-25 have been harassed or abused online.¹⁶⁸ The government has recognized the seriousness of the issue, and announced in 2017 that it would develop a coordinated strategy,¹⁶⁹ though there has been little progress.

The legal precedence of a noteworthy case involving the nonconsensual sharing of intimate material has taken on new significance. In a highly praised 2016 landmark civil court decision, a man who published intimate videos of his ex-girlfriend without her consent was ordered to pay C\$100,000 (\$75,000) to his former partner, who suffered severe emotional distress.¹⁷⁰ Later that year, however, the default judgment was set aside,¹⁷¹ and an appeal of this decision was denied.¹⁷² 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 was ordered to pay C\$100,000 (\$75,000) in damages.¹⁷³ In December 2019, a court cited the tort in awarding significant damages in a family law case involving a man cyberbullying his ex-wife and posting negative videos of their minor children online.¹⁷⁴ The 2016 case continues to be cited by other plaintiffs, authors, and courts.¹⁷⁵ The newly established tort of “internet harassment” (see B2 and C2) could in theory also find relevance in these cases. There are also increasing calls for tech companies to take aggressive action in removing such material,¹⁷⁶ and to face criminal penalties.¹⁷⁷ Pornhub, a Montreal-

¹⁶⁴ “A.T. v. Globe24h.com, 2017 FC 114,” CanLII, January 30, 2017, <https://www.canlii.org/en/ca/fct/doc/2017/2017fc114/2017fc114.html>

¹⁶⁵ “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-statcan-1.3903435>.

¹⁶⁶ 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>.

¹⁶⁷ 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/>.

¹⁶⁸ News release, “Online harassment is silencing girls online, driving them from Facebook, Instagram and Twitter,” October 5, 2000, <https://www.newswire.ca/news-releases/online-harassment-is-silencing-girls-online-driving-them-from-facebook-instagram-and-twitter-802561885.html>.

¹⁶⁹ “Feds eye sexting, cyber violence strategy,” *CBC News*, March 27, 2017, <https://www.cbc.ca/news/canada/sudbury/cyber-violence-harassment-sexting-1.4042232>.

¹⁷⁰ “Doe 464533 v N.D., 2016 ONSC 541,” CanLII, January 21, 2016, <http://canlii.ca/t/gn23z>.

¹⁷¹ “Doe v N.D., 2016 ONSC 4920,” CanLII, September 16, 2016, <https://www.canlii.org/en/on/onsc/doc/2016/2016onsc4920/2016onsc4920.html>.

¹⁷² “Doe 464533 v N.D., 2017 ONSC 127,” CanLII, January 9, 2017, <https://www.canlii.org/en/on/onsc/doc/2017/2017onsc127/2017onsc127.html>.

¹⁷³ Jane Doe 72511 v. Morgan, 2018 ONSC 6607; See also: 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/>.

¹⁷⁴ “Yenovkian v. Gulian, 2019 ONSC 7279,” CanLII, December 17, 2019,

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

¹⁷⁵ 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/>.

¹⁷⁶ Karen Pauls, “Woman who spent years scrubbing explicit video from internet urges tech firms to make it easier to remove,” *CBC News*, December 1, 2020, <https://www.cbc.ca/news/canada/manitoba/canada-internet-children-abuse-pornography-1.5822042>.

¹⁷⁷ Christopher Reynolds, “Survivors, NGOs call for criminal investigation of porn giant MindGeek,” *CBC News*, March 4, 2021, <https://www.cbc.ca/news/politics/calls-for-criminal-investigation-mindgeek-1.5937117>.

based tech giant, faced numerous lawsuits filed during the coverage period in Canada and the United States accusing them of profiting from underage non-consensual intimate images.¹⁷⁸

Additionally, many provinces, including Manitoba¹⁷⁹ and Alberta,¹⁸⁰ 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.¹⁸¹ By December 2019, Canadian police forces received nearly 5,000 complaints since nonconsensual sharing of intimate material was federally criminalized in December 2014.¹⁸²

	2019	2020	2021
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 have become 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 between November 2018 and October 2019 increased sixfold over the previous reporting period.¹⁸³ It is unclear whether the number of breaches is increasing or the mandatory reporting requirement has led to more reports. The OPC also reported that over 28 million Canadians were affected by data breaches during the 2018–19 period.¹⁸⁴ Statistics Canada reported that 57 percent of internet users suffered some sort of cybersecurity incident during the 2018 calendar year,¹⁸⁵ and about one-fifth of Canadian businesses were impacted by cyber security incidents in 2019.¹⁸⁶ During the previous coverage period, major Canadian companies were subject to numerous cyberattacks and data breaches, including Lifelabs, Canada’s largest healthcare lab testing company, and the Desjardins Group, one of Canada’s largest banking groups.¹⁸⁷ An OPC investigation found Desjardins violated numerous provisions of PIPEDA.¹⁸⁸ In September 2020, major Canadian e-commerce company Shopify was a victim of data theft by its own employees.¹⁸⁹

During the coverage period, a survey released by the Canadian Internet Registration Authority (CIRA) indicated one-third of respondents said their organization was targeted by a pandemic-related cyberattack.¹⁹⁰ Experts warn that increased online activities such as shopping during the pandemic has led to a massive increase in vulnerable online personal data,¹⁹¹ which was also

¹⁷⁸ Selena Ros, “New lawsuit against Pornhub alleges improvements to the site don’t go far enough,” CTV News, February 13, 2021, <https://montreal.ctvnews.ca/new-lawsuit-against-pornhub-alleges-improvements-to-the-site-don-t-go-far-enough-1.5308001>.

¹⁷⁹ “Intimate Image Protection Act, C.C.S.M. c. I87,” October 1, 2020, <https://web2.gov.mb.ca/laws/statutes/ccsm/pdf.php?cap=i87>.

¹⁸⁰ “Protecting Victims of Non-Consensual Distribution of Intimate Images Act, S.A. 2017 ch. P-26.9,” August 4, 2017, <http://www.qp.alberta.ca/documents/Acts/P26p9.pdf>.

¹⁸¹ “R. v. P.S.D., 2016 BCPC 400,” CanLII, December 12, 2016, <https://www.canlii.org/en/bc/bcpc/doc/2016/2016bcpc400/2016bcpc400.html>; See also: “R. v. A.C., 2017 ONCJ 129,” CanLII, February 16, 2017, <https://www.canlii.org/en/on/oncj/doc/2017/2017oncj129/2017oncj129.html?resultIndex=1>.

¹⁸² 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>.

¹⁸³ 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/>.

¹⁸⁴ Ibid.

¹⁸⁵ Statistics Canada, “Cybercrime in Canada,” December 2, 2019, <https://www150.statcan.gc.ca/n1/pub/89-28-0001/2018001/article/00015-eng.htm>.

¹⁸⁶ Statistics Canada The Daily, “About one-fifth of Canadian businesses were impacted by cyber security incidents in 2019,” October 20, 2020, <https://www150.statcan.gc.ca/n1/daily-quotidien/201020/dq201020a-eng.htm>.

¹⁸⁷ Aidan Wallace, “Major data breaches in 2019,” January 1, 2020, *Toronto Sun*, <https://torontosun.com/news/world/major-data-breaches-in-2019>.

¹⁸⁸ PIPEDA Report of Findings #2020-005, December 14, 2020, <https://www.priv.gc.ca/en/opc-actions-and-decisions/investigations/investigations-into-businesses/2020/pipeda-2020-005/>.

¹⁸⁹ “Shopify fires 2 employees for stealing customer data from up to 200 merchants,” CBC News, September 23, 2020, <https://www.cbc.ca/news/business/shopify-data-breach-1.5735191>.

¹⁹⁰ Sarah Cole, “Canada Bombarded with COVID-19-Themed Cyber-attacks,” info security magazine, October 6, 2020, <https://www.infosecurity-magazine.com/news/canada-bombarded-with-covid19/>. Original CIRA report at <https://www.cira.ca/cybersecurity-report-2020>.

¹⁹¹ “Pandemic online shopping boom has generated bumper crop of vulnerable personal data, e-commerce experts warn,” CBC News, January 22, 2021, <https://www.cbc.ca/radio/spark/pandemic-online-shopping-boom-has-generated-bumper-crop-of-vulnerable-personal-data-e-commerce-experts-warn-1.5883949>.

stressed by the Canadian government's Canadian Centre for Cyber Security who reported that increased online activities during the pandemic will lead to increases of identity theft and financial fraud.¹⁹² The report also cited state-sponsored actors from China, Russia, Iran, and North Korea, as the greatest strategic cybersecurity threats to Canada.¹⁹³

Cyberattacks and data breaches have also affected federal government agencies. Most recently, in August 2020, the Canada Revenue Agency (CRA), the federal department that oversees taxation and other financial services, suffered multiple significant cyberattacks that compromised the usernames and passwords of thousands of online accounts,¹⁹⁴ which has led the CRA to lock out 800,000 Canadians from their accounts as a precautionary measure in March 2021.¹⁹⁵ In February 2020, the government disclosed that agencies suffered thousands of privacy breaches affecting the personal information of at least 144,000 Canadians in 2018 and 2019; the actual figure may be higher due to underreporting.¹⁹⁶ In late 2017, the Bank of Canada's governor stated that cyberattacks are the most pressing concern for the financial system,¹⁹⁷ and the deputy privacy commissioner expressed similar concerns in April 2019.¹⁹⁸

¹⁹² Canadian Centre for Cyber Security, "National Cyber Threat Assessment 2020," November 16, 2020, <https://cyber.gc.ca/en/guidance/national-cyber-threat-assessment-2020>.

¹⁹³ News release, "Canadian Centre for Cyber Security Releases the Canadian National Cyber Threat Assessment 2020," November 18, 2020, <https://www.canada.ca/en/communications-security/news/2020/11/canadian-centre-for-cyber-security-releases-the-canadian-national-cyber-threat-assessment-2020.html>.

¹⁹⁴ Rachel D'Amore, "What to know (and do) about the CRA breach and shutdown," Global News, August 17, 2020, <https://globalnews.ca/news/7281074/cra-hack-online-services/>.

¹⁹⁵ Rachel Aiello, "CRA locking 800K Canadian taxpayers out of accounts," CTV News, March 12, 2021, <https://www.ctvnews.ca/canada/cra-locking-800k-canadian-taxpayers-out-of-accounts-1.5345069>.

¹⁹⁶ 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>

¹⁹⁷ 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>.

¹⁹⁸ Gregory Smolyne, "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/

