

Canada

	2017	2018	2019
Internet Freedom Status	Free	Free	Free
A. Obstacles to Access (0-25pts)	2	2	2
B. Limits on Content (0-35pts)	4	4	2
C. Violations of User Rights (0-40pts)	9	9	9
TOTAL* (0-100)	15	15	13

*0=most free, 100=least free

**A total score of 0-30=Free, 31-60=Partly Free, 61-100=Not Free

Key Developments, June 1, 2018 - May 31, 2019

- [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 December 2016, Canada's telecom regulator declared that high-speed internet should be a "basic telecommunications service" that all Canadians should receive. Internet and mobile phone penetration rates continue to grow, although there are still geographic disparities related to internet access, reliability, speed, quality and cost that especially affect more rural and remote areas.

	2017	2018	2019
A1: Do infrastructural limitations restrict access to the internet or the speed and quality of internet connections? (0–6 points)	0	0	0

Internet penetration rates have remained relatively steady in Canada, in both fixed-line and mobile. Mobile carriers have continued to deploy a number of newer technologies to provide mobile broadband service, including HSPA+ and LTE, yet penetration rates of new technologies are steady, as Canada is close to the saturation point, though small LTE increases have occurred in Canada's remote regions.

Broadband service of at least 5 megabits per second (Mbps) is available to just over 99 percent of Canadian households through a variety of technologies including fixed and wireless, according to the the Canadian Radio-television and Telecommunications Commission (CRTC).¹ There has been little change from previous years, leaving Canada short of its lofty goal of having 100 percent of Canadian households with access to internet connectivity and broadband speeds of at least 5 Mbps by the end of 2016.² By 2018, a more realistic goal was set, aimed at maintaining its 7.9 percent above the Organization of Economic Co-operation and Development (OECD) average for ultra-high-speed connections (50 Gbps download) and making sure 100 percent of households have access to LTE wireless by December 2026.³

In a landmark policy decision released in December 2016,⁴ the CRTC recognized the importance of ultra-high speed (50 Gbps download speed and above) internet access for the future of the Canadian economy. In the policy, the CRTC put forward a universal access goal, that all residential and business fixed-line customers should be able to have access to speeds of at least 50 Gbps (download) with unlimited data. Furthermore, it declared that high-speed internet access should be considered a "basic telecommunications service" – a description previously attached only to landline telephones – and established a CAD \$750

¹ Canadian Radio-television and Telecommunications Commission, "Communications Monitoring Report 2018," December 2018, <http://bit.ly/2vtACcc>.

² Canadian Radio-television and Telecommunications Commission, "Report on Plans and Priorities for 2016-2017," March 2016, <http://bit.ly/1Mo0awn>; Canadian Radio-television and Telecommunications Commission, "Departmental Plan 2017-2018", March 2017, <http://bit.ly/2obg6LF> (replacing the title "Report on Plans and Priorities" of the previous years).

³ Canadian Radio-television and Telecommunications Commission, "Departmental Plan 2018-2019", March 2018, <http://bit.ly/2vpPTuD>.

⁴ CRTC Telecom Regulatory Policy 2016-496, "Modern telecommunications services – The path forward for Canada's digital economy," December 21, 2016, <http://bit.ly/2nnSjgS>.

million fund to reach its targets.⁵ More than two years later, the CRTC finally announced criteria to spend the fund,⁶ but the plans have been criticized for what seems like the arbitrary inclusion of some rural communities and exclusion of others,⁷ and the CRTC lowering its targeted download speeds from 50 to 25 Gbps.⁸

	2017	2018	2019
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)	1	1	1

There is not a strong digital divide for users, although geography and price contribute to inequalities in access.

Mobile broadband data remains expensive compared to fixed-line. Costs of fixed-line high-speed internet access remain low because of more competition; this was bolstered in October 2016 when the CRTC, an independent public regulator, reduced the price of wholesale high-speed internet access.⁹

Perhaps the most important obstacle to availability and ease of access in Canada is geography. Canada is overwhelmingly urban, with 81 percent of the population living in urban areas.¹⁰ Furthermore, approximately 75 percent of the population lives within 160 kilometres of the border with the United States.¹¹ While providing “reliable and affordable telecommunications services of high quality” to rural areas is enshrined in Canadian law,¹² affordable high-speed internet services are lacking in rural areas, especially in Canada’s vast northern territories, which are underserved by infrastructure generally and telecommunications services in particular.

The urban-rural gap for higher-speed internet access remains pronounced. The CRTC’s 2018 figures confirm rural internet access prices are higher than urban access prices. Household broadband in the form of 5-9.99 Mbps services was available in 100 percent of urban areas compared to 98 percent in rural areas; this represents a small increase from 97 percent the previous year. The 98 percent figure however includes 10 percent where availability was only via wireless services (HSPA+ and LTE), which are generally more expensive, especially as data usage rates increase. Faster speeds, such as 30-49.99 Mbps, are only available in 41 percent of rural households, compared to 100 percent of urban households. Canada’s most rural and remote territory, Nunavut, has zero availability speeds above 10 Mbps.¹³

The government’s patchwork approach to providing better connectivity to more remote communities indicates that there is a lack of an overall strategy in the area. The 2018 government budget identified new technologies, specifically LEO satellites, to enhance rural connection.¹⁴ While the plan was short on specifics, it pledged CAD 100 over five years for research and development. There was little else to support new

⁵ “CRTC establishes fund to attain new high-speed Internet targets,” Government of Canada News Release, December 21, 2016, <http://bit.ly/2nw8S1M>.

⁶ Emily Jackson, “CRTC reveals criteria for \$750M broadband fund for rural internet access,” *The National Post*, September 27, 2018, <http://bit.ly/2PzOwTc>.

⁷ Joanne Francis, “CRTC’s promise of high speed, unlimited internet for rural Canadians falls short,” *Nipawin News*, January 23, 2019, <http://bit.ly/2PACxFb>.

⁸ @CRTCeng, CRTC Tweet, September 28, 2018, 11:54 AM, <https://twitter.com/CRTCeng/status/1045703321669914624>.

⁹ Canadian Radio-television and Telecommunications Commission, Telecom Order CRTC 2016-396, October 6, 2016, <http://bit.ly/2ocClkt>.

¹⁰ From the 2011 census. See Statistics Canada data at <http://bit.ly/1pHhdjd>, accessed March 20, 2017.

¹¹ National Geographic “Canada Facts”, accessed March 20, 2017, <http://on.natgeo.com/1pHhpPv>.

¹² See the *Telecommunications Act*, S.C. 1993, c.38, section 7(b), <http://bit.ly/1ZpuSrg>.

¹³ All figures in this paragraph from the Canadian Radio-television and Telecommunications Commission, “Communications Monitoring Report 2018,” *supra* note 1.

¹⁴ “Quality + Growth = A Strong Middle Class”, The Honourable William Francis Morneau, February 27, 2018, <http://bit.ly/2vuYUT2>. Refer to PDF version at <https://www.budget.gc.ca/2018/docs/plan/budget-2018-en.pdf>, page 120.

connectivity. In the 2017 budget,¹⁵ the government took more proactive positions in ensuring ease of access to the internet in a variety of ways. The budget, again however, was also short on details, only pointing to the investments for rural connectivity announced in the 2016 budget, a CAD 500 million pledge over five years for a new program to “extend and enhance broadband service in rural and remote communities.”¹⁶

There is also a considerable gap in access related to income: the highest income bracket has a penetration rate of nearly 95 percent, while the penetration rate within the lowest income bracket is closer to 63 percent.¹⁷ Internet connectivity is 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 of Canada’s official languages (English and French) as well as many other languages.

	2017	2018	2019
A3: Does the government exercise technical or legal control over internet infrastructure for the purposes of censorship, surveillance, or restricting connectivity? (0–6 points)	0	0	0

There are no government restrictions on bandwidth, although the major access providers generally offer services that have caps on bandwidth that result in increased fees for users who exceed the limit. Such limits are much more restrictive for wireless connectivity than for wired connectivity, which further accentuates the urban-rural divide for connectivity costs in Canada. While reports of ISPs throttling its users during peak periods were widespread several years ago,¹⁸ such reports have dried up considerably.

The government has not centralized the telecommunications infrastructure in Canada. However, given the vertical integration of the Canadian marketplace, the telecom infrastructure is controlled by a small number of companies, which in theory could facilitate greater control of content and the implementation of surveillance technologies, although this has never materialized. In fact, the CRTC rejected a proposal to limit access to websites on the basis of copyright infringement (see B1), which would have been easy to implement considering the small number of ISPs in Canada. The government does not restrict access to any social media or communications apps.

	2017	2018	2019
A4: Are there legal, regulatory, or economic obstacles that restrict the diversity of service providers? (0–6 points)	1	1	1

There are both 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, leads to concentration of service providers amongst just a few companies, especially for mobile providers.

To operate as a Canadian telecommunications carrier, a company must meet the requirements in section 16 of the Telecommunications Act. In 2017 (the most recent available data), Canadian retail telecommunications revenues (comprised of wireline, wireless, internet, and data and private lines) amounted to a total of CAD 50.3 billion, which represented a 3.2 percent increase from the previous year. The five largest companies (Bell, Québecor, Rogers, Shaw, and TELUS) accounted for 87 percent of total revenues. This is up 2 percent from last year, mostly due to Bell’s acquisition of a small company, MTS. The revenue share of the five companies has remained relatively steady over the years.¹⁹

The growth in the market for internet services outpaces that of the ICT market generally. According to the CRTC’s 2018 Communications Monitoring Report, the revenues for the retail internet services sector were CAD

¹⁵ “Building a Strong Middle Class”, The Honourable William Francis Morneau, March 22, 2017, at <http://bit.ly/2neJqfC>.

¹⁶ See “Growing the Middle Class”, federal government budget document, March 22, 2016, at page 106, <http://bit.ly/1UXyqJ5> (PDF).

¹⁷ Statistics Canada, “Canadian Internet use by age group and household income for Canada, provinces, and metropolitan areas,” CANSIM, Table 358-0154, accessed March 27, 2017, <http://bit.ly/2obEXza>. Data is from 2012, the most recent available.

¹⁸ See e.g. Michael Geist, “When it comes to net neutrality, Canada’s going at half-throttle,” *The Toronto Star*, August 7, 2015, <http://on.thestar.com/2nwgBwH>.

¹⁹ Canadian Radio-television and Telecommunications Commission, “Communications Monitoring Report 20187,” *supra* note 1.

11 billion in 2017, representing a growth of approximately almost 8 percent from the previous year, and mobile revenues generally (voice and data) rose 5.3 percent from the previous year.

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 generally vary region to region, and some providers are restricted to urban areas. Restrictions on foreign investment impose some limits, though a few foreign companies have entered the marketplace in recent years. The provision of access services is subject to regulation with rules on tower sharing, domestic roaming agreements, and a consumer regulator to address consumer concerns.

For wireless services, three companies dominate the market: Bell, Telus, and Rogers. The wireless market is particularly concentrated with those three companies having 92 percent of Canadian wireless subscribers.²⁰ Those same companies are also leaders in the provision of wired internet services (whether via phone lines or cable), along with Shaw, Cogeco, and Vidéotron (owned by Québecor). While Canadians generally do enjoy a choice of wired internet providers, again this choice will vary from region to region, and often there is only one choice per technology type, leading to a public perception that there is not much choice and that prices are kept artificially high. This perception is not without merit as it pertains to wireless data, as a 2018 report determined that Canada's wireless data prices were some of the most expensive in the world.²¹

	2017	2018	2019
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)	0	0	0

The CRTC, the regulatory body that oversees the communications industry, operates largely independently from the government. The government appoints the CRTC chair and commissioners without public consultation, but they are not subject to political pressure. The government has, in some cases, provided guidance on their policy expectations regarding telecommunication regulations, but these are non-binding. Moreover, CRTC decisions can be appealed to the courts, or a government review can be requested. The government has overturned CRTC decisions and directed it to reconsider the issue in the past, but this has been rare.

CRTC's regulatory powers extend to *access* of the internet in Canada, but not to *content* of the internet; this is commonly called the New Media Exemption. The CRTC's position to not regulate internet content dates back to 1999 and has been reinforced numerous times since then,²² including by the Supreme Court of Canada.²³ This is in contrast to other industries, specifically television, where the CRTC does exert some control over content, most notably by requiring a minimum amount of Canadian content by Canadian broadcasters.

B. Limits on Content

The Canadian government does not generally block websites or filter online content, although a court can rule to remove illegal content. YouTube, Facebook, Twitter, and international blog-hosting services are freely available. In January 2018, digital rights activists raised concerns when an anti-piracy coalition called FairPlay Canada petitioned the Canadian regulator to implement a system to block websites hosting pirated content, though this was ultimately rejected by the regulator later in the year.

²⁰ Canadian Radio-television and Telecommunications Commission, "Communications Monitoring Report 2018," [supra](#) note 1.

²¹ Michael Geist, "World's Worst Wireless Pricing?: Report Finds Canadian Wireless Broadband Pricing Offers Least Bang for the Buck in Developed World", May 4, 2018, <http://www.michaelgeist.ca/2018/05/worldsworstpricing/>

²² See most recently *Broadcasting Regulatory Policy CRTC 2015-355 and Broadcasting Order CRTC 2015-356*, August 6, 2015, <http://bit.ly/22HBQx9>.

²³ Reference re Broadcasting Act, 2012 SCC 4, <http://bit.ly/22HDXRm>.

	2017	2018	2019
B1: Does the state block or filter, or compel service providers to block or filter, internet content, particularly material that should be protected under international human rights standards? (0–6 points)	0	0	0

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

A serious effort to block Canadians' access to certain websites did in fact emerge in January of 2018. A group of more than 25 of Canada's ISPs, media companies, creative companies, and other interested parties – including major players such as Bell, Rogers and Canada's national broadcaster the CBC – grouped together as "FairPlay Canada"²⁴ to petition the CRTC to set up an independent body that would recommend blocking access to "websites and services that are blatantly, overwhelmingly, or structurally engaged in piracy."²⁵ The plan was heavily criticized by some commentators for a variety of reasons, including for possibly violating Canada's net neutrality regime and its potential extension to non-piracy sites.²⁶ Other commentators insisted it was a necessary tool to fight online piracy and protect copyright.²⁷ Ultimately, the proposal was rejected by the CRTC due their determination they had a lack of jurisdiction to implement the plan; however they did invite parliament to look at the issue.²⁸

	2017	2018	2019
B2: Do state or nonstate actors employ legal, administrative, or other means to force publishers, content hosts, or digital platforms to delete legitimate content? (0–4 points)	2	2	1

Non-state actors, specifically large media companies, will use legal means, most likely court actions, to force digital platforms to delete content, generally because it is infringing copyright.

Despite the good intentions, Canada's notice-and-notice regime—requiring ISPs to forward notices from copyright holders alleging infringement to their subscribers—has been subject to considerable misuse. However, a significant development during the reporting period should ease this problem (see B3). Several U.S.-based anti-piracy firms, including Rightscorp and CEG-TEK, used the system to send notifications to subscribers that misstate Canadian law, citing U.S. damage awards and the possibility that their internet access will be terminated, in order to sow fear among Canadians so that they pay a settlement fee.²⁹ The Canadian government finally reacted to this problem by amending the notice and notice regime under the Copyright Act, putting significant restrictions on the content of the notices. The ISP no longer has to forward the notice to its subscriber if it contains an offer to settle the claimed infringement, a request or demand, made in relation to the claimed infringement, for payment or for personal information, or a link to such offers or demands.³⁰ The changes in the law have, anecdotally at least, led to a significant drop in these notices being sent. The author of this report, a lawyer specializing in internet law, had been receiving a significant volume of these notices from panicked Canadians prior to the change; since the change, he has not received any.

Media companies have continued to successfully 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

²⁴ See FairPlay Canada home page at <https://www.fairplaycanada.com/>.

²⁵ FairPlay Canada, *Application pursuant to sections 24, 24.1, 36, and 70(1)(a) of the telecommunications act, 1993 to disable on-line access to piracy sites*, January 29, 2018, PDF available at <http://bit.ly/2HKQUSJ>.

²⁶ See e.g. Michael Geist's nine-part series, "The Case Against the Bell Coalition's Website Blocking Plan", February 2018, available at <http://www.michaelgeist.ca/>.

²⁷ See e.g. Barry Sookman, "Why the CRTC should endorse FairPlay's website-blocking plan: a reply to Michael Geist", February 12, 2018, <http://bit.ly/2HN9XvN>.

²⁸ CRTC news release, "CRTC denies FairPlay Canada's application on piracy websites on jurisdictional grounds", October 2, 2018, <http://bit.ly/2PT22AC>. See also CRTC Telecom Decision CRTC 2018-384, <http://bit.ly/2PRfjz>.

²⁹ Jeremy Malcolm, "Canada Must Fix Rightsholder Abuse of its Copyright Notice System," *Deeplinks Blog*, Electronic Frontier Foundation, April 23, 2015, <http://bit.ly/29hzJGZ>.

³⁰ Bill C-86, Budget Implementation Act, 2018, No. 2, amending the *Copyright Act*, assented to December 13, 2018, available at <http://bit.ly/2PCODPK>.

services facilitating such activities. In March 2017, the Federal Court of Appeal upheld a lower court decision granting an injunction shutting down websites selling copyright-infringing set-top boxes.³¹

The Supreme Court of Canada (SCC) in June 2017 released its long-anticipated decision in the appeal of the British Columbia Court of Appeal's judgment in *Google Inc. v. Equustek Solutions Inc.*,³² a closely-watched case in which a court ordered Google to remove links from its global index to websites that infringed on the plaintiffs' trademark. The SCC upheld the worldwide removal order (see B3).

Defamation claims may also result in the removal of content, as content hosts fear potential liability as a publisher of the defamatory content. The SCC in November 2017 heard an appeal in a highly-watched case involving the publication of defamatory content on an Israeli website regarding a Canadian resident, and whether Canadian courts have jurisdiction to hear the matter.³³ In a decision released in June 2018, the court held that Israel was a more appropriate forum for a defamation lawsuit, despite damages having been incurred in Canada, thus declining the Canadian court's jurisdiction.³⁴ Defamation claims may also prevent the posting of content, as a British Columbia (BC) Court of Appeal case demonstrated when it ordered a defendant to not post anything about the plaintiff, as well as awarding damages.³⁵

In Quebec, Canada's French-speaking province, websites that are commercial in nature are legally required to be in French,³⁶ although they can also be in other languages. Violators may receive a warning from a government agency ordering the website be in French, and then be subject to fines if they do not comply. Some website operators may choose to take down their websites rather than face the expense of translation or the fines. National or international operators of websites who do business in Quebec (who would then be subject to the law) may block Quebec residents' access to their websites rather than comply.³⁷

	2017	2018	2019
B3: Do restrictions on the internet and digital content lack transparency, proportionality to the stated aims, or an independent appeals process? (0–4 points)	0	0	0

There are a few legal mechanisms that may lead to the blocking or removal of content in Canada.

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 of Canada (as opposed to content hosted within Canada, which is subject to removal).³⁸ Accessing child sexual abuse content is illegal in Canada under section 163.1(4.1) of the Criminal Code,³⁹ as well as under international human rights standards. The initiative is targeted at international sites that the Canadian government does not have the jurisdiction to shut down.

Bill 74, the province of Quebec's controversial law requiring ISPs to block access to online gambling sites, came into effect in May 2016,⁴⁰ but remains inoperative. On July 18, 2018, a Quebec court declared the law unconstitutional as the subject matter (telecommunications and criminal law) are federal, not provincial matters.⁴¹

Canada's tough anti-spam law informally known as "CASL", which regulates commercial electronic messages ("CEMs"), has been in effect since July 1, 2014. CASL prescribes certain content requirements in electronic messages (such as unsubscribe mechanisms and contact information) and restricts sending such messages without appropriate consent. CASL places significant restrictions on email marketers, and violators can face

³¹ *Wesley dba MTLFREETV.com v Bell Canada et al*, 2017 FCA 55, <http://bit.ly/2nvkTod>.

³² 2017 SCC 34, <http://bit.ly/2ttsDgi>.

³³ *Haaretz.com, et al. v. Mitchell Goldhar*, SCC case information at <http://bit.ly/2HMShAw>, leave to appeal from the decision of the Court of Appeal for Ontario, 2016 ONCA 515, <http://bit.ly/2nvkYIs>.

³⁴ *Haaretz.com v. Goldhar*, 2018 SCC 28, <http://bit.ly/2M0YMBO>.

³⁵ *Nazerli v. Mitchell*, 2018 BCCA 104, <http://bit.ly/2ISHgS7>.

³⁶ See the *Charter of the French Language*, c. C-11, article 52, <http://bit.ly/1Srh2Sm>.

³⁷ Elysia Bryan-Baynes, "Quebec language police target English retail websites," November 13, 2014, <http://bit.ly/1Srl50Y>.

³⁸ Cybertip!ca, "Cleanfeed Canada," <http://bit.ly/1jy5ws4>.

³⁹ *Criminal Code*, RSC 1985 c C-46 s 163.1(4.1).

⁴⁰ Michael Geist, "Government-Mandated Website Blocking Comes to Canada as Quebec's Bill 74 Takes Effect", May 26, 2016, <http://bit.ly/22r74ET>.

⁴¹ *Association canadienne des télécommunications sans fil c. Procureure générale du Québec*, 2018 QCCS 3159 (CanLII), <http://bit.ly/2BFrabw>.

finances. However, the government suspended the enactment of CASL's "private right of action" provision, which was due to come in to force in July 2017 and would have allowed individuals to sue CEMs for CASL violations.⁴²

There have been few new enforcement decisions involving CASL recently, though there have been several interesting developments and "firsts" under the law. In conjunction with a 2017 compliance decision, CompuFinder challenged the constitutionality of CASL, but this was rejected by the CRTC.⁴³ Even while a parliamentary committee recommended certain significant changes to CASL,⁴⁴ the enforcement did in fact continue, and for the first time the law was applied to text messages, with a company receiving a CAD \$100,000 fine.⁴⁵ Also for the first time, fines were levied against two companies for malicious online advertising practices in July 2018, violating CASL's anti-malware provisions.⁴⁶ Separately, in April 2019, a director of a company was held personally liable for his company violating CASL, also a first under the law.⁴⁷

With respect to removal of content due to copyright infringement, in 2004 the Supreme Court of Canada ruled that ISPs are not liable for violations committed by their subscribers,⁴⁸ and this safe harbor has now been enshrined in Canadian law.⁴⁹ Canadian copyright law features a notice-and-notice provision in effect since January 2015, which, unlike a notice-and-takedown system, does not make intermediaries legally liable for removing content upon notification by the copyright owner. Rather, copyright owners are permitted to send notifications alleging infringement to ISPs. The ISPs are then required to forward the notifications to the implicated subscriber. Any further legal action is the responsibility of the copyright owner, and it is incumbent upon the person who uploaded the infringing content to remove it following a legal decision. No content is removed from the internet without a court order, and the ISP does not disclose subscriber information without court approval, although this has become increasingly common.⁵⁰ The issue of who should pay for the ISP's work in delivering this subscriber information worked its way through the courts recently, with plaintiffs winning an appeal rejecting them to pay the costs.⁵¹ However, this was then reversed by the Supreme Court of Canada who ordered some of the costs to be paid.⁵²

Following the March 2017 case surrounding copyright-infringing set-top boxes (see B2), the court found in January 2018, that the Defendant was in contempt of the Court's orders by continuing to be involved in the sale of set-top boxes.⁵³ In a decision released in February 2018, the Federal Court of Appeal found that there was a strong *prima facie* case against an operator of a website which facilitated the operation of such set-top boxes by offering software to obtain access to copyright-infringing material; therefore an injunction should be granted.⁵⁴ The Court preliminarily rejected the operator's argument that he was merely acting as an intermediary. The case is ongoing.

In the SCC's ruling in *Google Inc. v. Equustek Solutions Inc.*, the SCC's reasoning was strictly focused on the law of intellectual property and interlocutory injunctions, so it is unclear if such worldwide orders may be granted in other areas of law in the future. It is also unclear whether such worldwide orders can have effect in foreign jurisdictions. For example, a U.S. 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 U.S. based on the long-standing principle of Google as an intermediary.⁵⁵ In April 2018, Google took the U.S. judgment back to the original BC Court and asked for the injunction to be suspended, but the BC Court denied Google's application.⁵⁶

⁴² "Government of Canada suspends lawsuit provision in anti-spam legislation", Government of Canada news release, June 7, 2017, <http://bit.ly/2tZrZnM>. Please note this development occurred outside the coverage period.

⁴³ *Compliance and Enforcement Decision CRTC 2017-367*, October 19, 2017, <http://bit.ly/2HL4dCN>.

⁴⁴ Canada's Anti-Spam Legislation: Clarifications Are in Order, Report of the Standing Committee on Industry, Science and Technology, December 2017, <http://bit.ly/2G5wamM>.

⁴⁵ *Undertaking: 9118-9076 QUÉBEC INC. and 9310-6359 QUÉBEC INC. (514-BILLETTS)*, March 15, 2018, <http://bit.ly/2jQBq56>.

⁴⁶ CRTC, "CRTC issues \$250,000 in penalties to combat malicious online advertising", July 11, 2018, <http://bit.ly/2ISdvAU>.

⁴⁷ CRTC, "Spamming Canadians results in \$100,000 penalty for nCrowd's Corporate Director", April 23, 2019, <http://bit.ly/2IOxq3H>.

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

⁴⁹ *Copyright Act*, R.S.C., 1985, c. C-42, section 31.1, <http://bit.ly/2H0ICuv>.

⁵⁰ See e.g. *Voltage Pictures, LLC v. John Doe*, 2016 FC 881 (CanLII), at <http://bit.ly/2oA7Rfo>, 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.

⁵¹ *Voltage Pictures, LLC v. John Doe*, 2017 FCA 97 (CanLII), <http://bit.ly/2HMOvau>.

⁵² *Rogers Communications Inc. v. Voltage Pictures, LLC*, 2018 SCC 38, <http://bit.ly/2PTEl5f>.

⁵³ *Bell Canada v. Vincent Wesley dba MtlFreeTV.com*, 2018 FC 66, <http://bit.ly/2HNjl2v>.

⁵⁴ *Bell Canada v. Lackman*, 2018 FCA 42, <http://bit.ly/2HMMhHS>.

⁵⁵ *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, <http://bit.ly/2HKVvVe>.

⁵⁶ *Equustek Solutions Inc. v. Jack*, 2018 BCSC 610, <http://bit.ly/2G7GqLg>.

Unlike legal protections against liability for copyright infringement by its users, platforms 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 it actually repeats the defamatory content, thus links would not be removed.⁵⁷

	2017	2018	2019
B4: Do online journalists, commentators, and ordinary users practice self-censorship? (0–4 points)	1	1	1

There does not appear to be widespread self-censorship in Canadian online publications, and there is no evidence of government manipulation of online content. However, certain individuals may self-sensor, for fear of potential government surveillance under Bill C-51.

	2017	2018	2019
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)	0	0	0

Some sites are affiliated with a partisan interest, but there are representative sites from all sides of the political spectrum available online. The government or other powerful actors do not in any way control or manipulate online sources of information to advance a particular political interest. The government appears to be making a nonpartisan effort to combat online disinformation in advance of the October 2019 federal election, by passing the Election Modernization Act, which provides for a number of reforms including preventing foreign interference and regulating third-party advertising.⁵⁸

	2017	2018	2019
B6: Are there economic or regulatory constraints that negatively affect users' ability to publish content online? (0–3 points)	0	0	0

There are no economic or regulatory constraints that negatively affect users' ability to publish 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 media is presented neutrally by ISPs. In April 2017, the CRTC released a pair of Telecommunications Policies that effectively ruled against differential pricing for certain ISP services and the "zero-rating" of certain media services, where ISPs would not have the use of certain preferred media charged against a user's data cap.⁵⁹ With these Policies, the CRTC substantively completed (in conjunction with several other Policies) a national framework that ensures net neutrality remains Canadian public policy. In a May 2018 report, a Parliamentary Committee encouraged the government to strengthen net neutrality in Canada even further, by recommending it enshrine the principle in the *Telecommunications Act*.⁶⁰ Canadians have expressed concerns,

⁵⁷ *Crookes v. Newton*, 2011 SCC 47, <http://bit.ly/1SrcV8P>.

⁵⁸ Elise von Scheel, "New rules for pre-election spending kick in Sunday", CBC News, June 29, 2019, <https://www.cbc.ca/news/politics/c76-election-pre-writ-rules-the-house-1.5193828>. Text of the Act can be found at https://laws-lois.justice.gc.ca/eng/annualstatutes/2018_31/page-1.html.

⁵⁹ *Telecom Regulatory Policy CRTC 2017-104*, "Framework for assessing the differential pricing practices of Internet service providers", April 20, 2017, <http://bit.ly/2quuyfj>, and *Telecom Decision CRTC 2017-105*, "Complaints against Quebecor Media Inc., Videotron Ltd., and Videotron G.P. alleging undue and unreasonable preference and disadvantage regarding the Unlimited Music program," April 20, 2017, <http://bit.ly/2rOe99A>.

⁶⁰ *The Protection of Net Neutrality in Canada*, Report of the Standing Committee on Access to Information, Privacy and Ethics, May 2018, PDF report at <http://bit.ly/2KgvBZP>.

however, that repeal of net neutrality in the United States will have negative effects on Canadians' internet activities.⁶¹

In its 2017 budget, the Canadian government made a significant statement on the subject, promising to review telecommunications legislation to ensure that "Canadians continue to benefit from an open and innovative internet" in the context of net neutrality and other digital policy considerations. However, it is unclear whether these reforms will have a positive or negative impact on online content,⁶² and especially Canadian content. The government's statement reflected a report from the Department of Canadian Heritage outlining the future of Canadian Content in the digital age, following extensive public consultations on the subject.⁶³ The Department of Canadian Heritage, in the wake of the report, announced a deal with Netflix that would see the service spend a minimum of CAD \$500 million on Canadian production over the next five years.⁶⁴ Shortly thereafter, the government stated that Netflix services would not be subject to the national Goods and Services Tax,⁶⁵ a position repeated by the Prime Minister during a Parliamentary debate on the subject,⁶⁶ and reiterated by the Finance Minister.⁶⁷ Some provinces had other ideas however; both Quebec and Saskatchewan now charge provincial sales taxes on out of province digital platforms, including Netflix (amongst others such as Google, Amazon, and Spotify in Quebec's case).⁶⁸ It is unclear at this time what the long-term effect on online content of these moves will be.

Finally, the CRTC launched a full consultation process on the future of content distribution in Canada following a request from the government.⁶⁹ In May 2018, the CRTC unveiled a comprehensive report on the matter,⁷⁰ but it offered little in the way of innovative strategies. Some commentators noted that the report appeared to allow for and suggest a variety of internet regulation and taxation,⁷¹ but this has not yet materialized.

	2017	2018	2019
B7: Does the online information landscape lack diversity? (0–4 points)	0	0	0

The online environment in Canada is relatively diverse, and internet users have access to a wide range of news, content, and opinions. All major media organizations operate websites with articles, audio, and video. The public broadcaster maintains a very comprehensive website that includes news articles and streamed video programming. Paywalls have become increasingly popular among newspaper organizations, but there remains considerable choice (including alternate, independent media) that is freely available.

⁶¹ "Q&A: What would a U.S. repeal of net neutrality mean for Canadians?", CBC Radio News, December 8, 2017, <http://bit.ly/2GKjMt3>.

⁶² See e.g. Michael Geist, "Budget 2017: Why Canada's Digital Policy Future Is Up For Grabs," March 22, 2017, <http://bit.ly/2nf3Chd>.

⁶³ Ipsos Public Affairs for the Department of Canadian Heritage, "What we Heard Across Canada: Canadian Culture in the Digital World", February 21, 2017, <http://bit.ly/2nfa8o4>.

⁶⁴ Daniel Leblanc, "Netflix deal the centrepiece of cultural policy", *The Globe and Mail*, September 27, 2017, <https://tgam.ca/2GNA4S9>.

⁶⁵ The Canadian Press, "Netflix tax not in the cards, Finance Minister Bill Morneau says", *The Star*, December 10, 2017, <http://bit.ly/2GLknuC>.

⁶⁶ Rose Behar, "Prime Minister Trudeau reiterates government's firm opposition to 'Netflix Tax'", *Mobile Syrup*, February 8, 2018, <http://bit.ly/2GNGXCZ>.

⁶⁷ Bill Curry, "Canada won't act alone on new tax rules for digital giants: Morneau", *The Globe and Mail*, October 12, 2018, <https://tgam.ca/2IQBIHz>.

⁶⁸ CBC News, "Netflix now charging Sask. customers PST for streaming service", January 19, 2019, <http://bit.ly/2IUua6K>.

⁶⁹ *Broadcasting Notice of Consultation CRTC 2017-359*, October 12, 2017, <http://bit.ly/2GM1hET>. See also background reference document from the CRTC, "Consultation on the future of program distribution in Canada", at <http://bit.ly/2GLVT4k>.

⁷⁰ *Harnessing Change: The Future of Programming Distribution in Canada*, CRTC, May 31, 2018, <http://bit.ly/2NoVMQ0>.

⁷¹ See e.g. Michael Geist, "Regulate Everything: The CRTC Goes All-In on Internet Taxation and Regulation", May 31, 2018, <http://bit.ly/2IVeb8j>.

	2017	2018	2019
B8: Are there restrictions on individuals' use of digital tools to mobilize, form communities, and campaign, particularly regarding political and social issues? (0–6 points)	1	1	0

Social media and communication applications and mobilization tools are available and have been widely used in Canada for the mobilization of political and social movements. Online digital activism played a significant role in the Liberal government's promise to repeal the problematic aspects of the Anti-Terrorism Act and played a part in ultimately forcing the government to introduce a new bill, Bill C-59, to fix it (see C5). Much online activism targeted at the ICT sector is spearheaded by a popular non-partisan, non-profit organization called Open Media, which advocates for three pillars of internet rights – free expression, access, and privacy.⁷²

Canadians have been especially active in the online #MeToo movement,⁷³ prompting Canada's Justice Minister to consider updating certain laws, for example to ensure victims of sexual violence are treated more compassionately in courtrooms.⁷⁴ This online activism also prompted the federal government to introduce Bill C-65,⁷⁵ which became law in October 2018 and has dramatically updated harassment laws as they apply to federal government and federally-regulated workplaces.⁷⁶ Online activism likely played a role in Canada's decision to legalize cannabis country-wide,⁷⁷ which went into effect during the reporting period.

C. Violations of User Rights

Canada has a generally positive record for freedom of expression online. Promised reforms to controversial elements of the Anti-Terrorism Act passed in June 2015, which permits information-sharing across government agencies for a wide range of purposes, began to materialize, yet progress is extremely slow.

	2017	2018	2019
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)	1	1	1

The Canadian Constitution includes strong protections for freedom of speech and freedom of the press. Freedom of speech in Canada 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."⁷⁸ These laws and protections apply to all forms of speech, whether online or offline. There are a few restrictions to online speech (see B2).

	2017	2018	2019
C2: Are there laws that assign criminal penalties or civil liability for legitimate online activities? (0–4 points)	2	2	2

⁷² See <https://openmedia.org/>.

⁷³ Adina Bresge, "Metoo movement prompting sexual-assault survivors to break silence to family", *National Post*, January 31, 2018, <http://bit.ly/2GLj4f9>.

⁷⁴ Kate Taylor, "Where to go after #MeToo", *The Globe and Mail*, December 9, 2017, <https://tgam.ca/2GNPCW1>.

⁷⁵ *An Act to amend the Canada Labour Code (harassment and violence), the Parliamentary Employment and Staff Relations Act and the Budget Implementation Act, 2017*, No. 1, 42nd Parliament, 1st Session, <http://bit.ly/2HJV4dP>.

⁷⁶ Statutes of Canada, chapter 22, available at <http://bit.ly/2ISLEAg>.

⁷⁷ Ian Brown, "The new activism isn't about laws: Stigma lingers despite end of cannabis prohibition", *The Globe and Mail*, October 17, 2018, <https://tgam.ca/2ISP1Hq>.

⁷⁸ Constitution Act, Canadian Charter of Rights and Freedoms, 1982, <http://bit.ly/1cijVUc>.

There are some limitations to freedom of speech online, such as significant criminal penalties for some forms of online expression, and civil liability for defamation emanating from common law principles, certain provincial defamation laws, or the general civil liability regime in Quebec.

Hate speech, along with advocating genocide and uttering threats and defamatory libel, are also regulated under the Canadian criminal code.⁷⁹ Punishment for defamatory libel, advocating genocide, and uttering threats may include imprisonment for up to five years, and up to two years for hate speech. Human rights complaints regarding potentially defamatory statements could also be decided through the mechanisms provided by provincial human rights laws and the Canadian Human Rights Act (CHRA);⁸⁰ however the controversial provision of the CHRA prohibiting hate speech (s. 13), which was perceived by many as being too broad, was repealed.⁸¹ The current government, however, is considering bringing a hate speech provision in some different form.⁸²

There are no specific online restrictions on sensitive topics. Anti-spam legislation, enacted in July 2014, requires opt-in consent to send commercial electronic messages (see B3). Critics of the legislation have argued that it is overly broad and seeks to overregulate commercial speech.

	2017	2018	2019
C3: Are individuals penalized for online activities that are protected under international human rights standards? (0–6 points)	0	0	0

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

	2017	2018	2019
C4: Does the government place restrictions on anonymous communication or encryption? (0–4 points)	0	0	0

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.

	2017	2018	2019
C5: Does state surveillance of internet activities infringe on users' right to privacy? (0–6 points)	3	3	3

In 2015, Canada passed Bill C-51, the Anti-Terrorism Act. The Act contains several provisions allowing for state surveillance of internet activities which can be seen as infringing users' rights to privacy. Bill C-51 permits information-sharing across government agencies for an incredibly wide range of purposes, many of which have nothing to do with terrorism. Several efforts to reform Canada's antiterrorism laws have finally begun to materialize, most recently with Bill C-59. This progress, however, is proceeding very slowly.

The Liberal government began to make good on their 2015 election promise to "repeal the problematic elements of Bill C-51."⁸³ The bill was opposed by all Canadian privacy commissioners but ultimately passed (by the previous Conservative government) and became law. The Liberals introduced Bill C-22 in June 2016 to establish a new multi-party national security oversight committee, which became law in June 2017 as the

⁷⁹ R.S.C 1985 c C-46, <http://bit.ly/22YUNYE>.

⁸⁰ R.S.C., 1985, c. H-6, <http://bit.ly/1qjY3zS>.

⁸¹ Bill C-304, An Act to amend the Canadian Human Rights Act (protecting freedom), S.C. 2013, chapter 37, <http://bit.ly/2IREUD1>.

⁸² Brain Platt, "Liberals reviewing option to revive controversial internet hate speech law repealed in 2013", *National Post*, January 22 2018, <http://bit.ly/2GQm0af>.

⁸³ Liberal Party platform on Bill C-51, <http://www.liberal.ca/realchange/bill-c-51/>.

National Security and Intelligence Committee of Parliamentarians Act.⁸⁴ The government continued to take steps to revamp the law, and finally introduced Bill C-59, *An Act Respecting National Security Matters*,⁸⁵ which goes further in fixing some of the more serious problems with the Anti-Terrorism Act.⁸⁶ For example, the criminal speech provisions that were overbroad are now much more limited, and there is now both independent oversight and significant parliamentary accountability. Some civil liberties groups, however, believe that Bill C-59 does not go far enough in fixing those issues,⁸⁷ and that it possibly grants Canada's Communications Security Establishment too many powers, including collection of mass amounts of data, albeit against foreign actors not Canadians. A government committee doing a clause by clause review of the bill has made some amendments to alleviate some outstanding issues;⁸⁸ however the legislation is only slowly working its way through the legislative process. By the end of the coverage period, the bill had passed first reading in the House of Commons, but is still being discussed in a Senate Committee.⁸⁹ While Canada's privacy commissioner is generally satisfied with the state of the bill as of now,⁹⁰ there are serious concerns that with an election looming in October, the bill will not pass before then.⁹¹

The Office of the Privacy Commissioner (OPC) provides an important oversight function related to privacy of Canadians' information in the digital medium. The Privacy Commissioner of Canada, 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,⁹² which covers the personal information-handling practices of federal government departments and agencies.

	2017	2018	2019
C6: Are service providers and other technology companies required to aid the government in monitoring the communications of their users? (0–6 points)	2	2	2

Both internet service providers and mobile providers may be required to aid the government in monitoring communications of their users, both via law and court orders.

The OPC and Canada's Privacy Commissioner, Daniel Therrien oversee compliance of the country's private sector privacy law,⁹³ the Personal Information Protection and Electronic Documents Act (PIPEDA).⁹⁴ PIPEDA was modified by the Digital Privacy Act⁹⁵ passed in June 2015, which 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 Digital Privacy Act also established new mandatory security breach disclosure requirements, which came into force November 1, 2018.⁹⁶ PIPEDA, however, remains relatively toothless. In its 2017-2018 annual Report,⁹⁷ the OPC repeated previous demands for order-making authorities and significant fines for breaches that were "more consistent with evolving international norms." The Privacy Commissioner has publicly reiterated these.⁹⁸

A Standing Committee on Access to Information, Privacy and Ethics (ETHI) report called for a significant number of changes in order to strengthen PIPEDA and make it more in line with the European GDPR.⁹⁹

⁸⁴ S.C. 2017, c. 15. <http://bit.ly/2HMZQXW>.

⁸⁵ 1st sess, 42nd Parl., June 20, 2017, <http://bit.ly/2GNi4Hq>.

⁸⁶ Craig Forcese and Kent Roach, "The roses and the thorns of Canada's new national security bill", *Macleans*, June 20, 2017, <http://bit.ly/2ttyLFk>.

⁸⁷ "Read CCLA's Submissions on Bill C-59," Canadian Civil Liberties Association, January 19, 2018, <http://bit.ly/2EDWQPG>.

⁸⁸ *Study - Bill C-59, An Act respecting national security matters*, 19th Report, Standing Committee on Public Safety and National Security (SECU), April 25, 2018, <http://bit.ly/2lvZ0BZ>.

⁸⁹ See bill information at <http://bit.ly/2J897Ne>.

⁹⁰ Daniel Therrien, "Appearance before the Senate Standing Committee on National Security and Defence (SECD) on C-59, An Act respecting national security matters", April 29, 2019, <http://bit.ly/2J69A05>.

⁹¹ Vassy Kapelos, "Our new Politics newsletter: Time running out to get things done", CBC News, April 28, 2019, <http://bit.ly/2IQzGHZ>.

⁹² R.S.C., 1985, c. P-21, <http://bit.ly/2oeXpH8>.

⁹³ Office of the Privacy Commissioner of Canada, "Mandate and Mission," <http://bit.ly/1LlfhTx>.

⁹⁴ Personal Information Protection and Electronic Documents Act (PIPEDA), S.C. 2000, c. 5, <http://bit.ly/1hVRkBe>.

⁹⁵ Bill S-4, S.C. 2015, c. 32, <http://bit.ly/2ofe25y>.

⁹⁶ *Breach of Security Safeguards Regulations*, published in the Canada Gazette, Part II: Volume 152, Number 8, on March 27, 2018, <http://bit.ly/2BZpmdQ>.

⁹⁷ Daniel Therrien, "2017-18 Annual Report to Parliament on the Personal Information Protection and Electronic Documents Act and the Privacy Act - Trust but verify: Rebuilding trust in the digital economy through independent, effective oversight", September 2018, <http://bit.ly/2ISiOLU>.

⁹⁸ Catharine Tunney, "Privacy watchdog taking Facebook to court, says company breached privacy laws", CBC News, April 25, 2019, <http://bit.ly/2IUfjEO>.

⁹⁹ Towards Privacy by Design: Review of the Personal Information Protection and Electronic Documents Act, February 2018, <http://bit.ly/2lwSY49> (the "ETHI Report"). See also Allen Mendelsohn (this report's author), "Privacy! Privacy! Privacy!", March 28, 2018, <http://bit.ly/2GeYrR2>.

However, with the pending October election, it is highly unlikely any significant legislative reforms will occur.

The OPC has also called for changes to the Privacy Act, which has not seen significant changes since 1983, saying that it is outdated in this digital age and is too permissive, allowing the government to too easily collect the personal information of Canadians.¹⁰⁰

The OPC shocked the Canadian legal community in January 2018 when it released a draft position paper that concluded that PIPEDA actually contained a European-style “right to be forgotten” or “right to erasure,” though this was called a “De-indexing Right.”¹⁰¹ Commentators questioned the OPC’s conclusions and reasoning.¹⁰² In October 2018, the OPC submitted a reference question to the Federal Court of Canada 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 activities are subject to PIPEDA, it would go a long way in supporting the De-indexing Right position.¹⁰³ Given the importance and potential ramifications of such a decision, the Federal Court could take a long time before issuing its decision. The ETHI Report called for the right to be forgotten to be included in future PIPEDA amendments.

The OPC conducts investigations into major data breaches to determine whether private companies comply with PIPEDA. In its investigation into the 2017 Equifax breach, OPC found major PIPEDA violations. In response, Equifax took numerous corrective measures and signed a compliance agreement.¹⁰⁴ In OPC’s investigation into the Facebook Cambridge Analytica scandal, Facebook refused to take significant corrective measures or implement the OPC’s recommendations.¹⁰⁵ As a result, the OPC announced it will take Facebook to court to attempt to have it comply.¹⁰⁶ In May 2019, Facebook’s Mark Zuckerberg and Sheryl Sandberg ignored a subpoena from a Parliamentary committee to testify on the scandal.¹⁰⁷

Numerous decisions have made it easier for Canadians to seek legal redress against foreign internet companies for privacy violations. In a landmark decision, the Supreme Court of Canada ruled that residents of the Canadian province 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.¹⁰⁸ 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 which granted the Quebec court jurisdiction.¹⁰⁹ 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, the Federal Court of Canada found that PIPEDA has extra-territorial application, and ordered a Romanian website to remove court decisions containing personal information of Canadian citizens that made them easily searchable through search engines, and never to post such information again.¹¹⁰ The Federal Court also ordered the Romanian website to pay damages to the plaintiff.

The Supreme Court of Canada continues to expand the right to privacy. Most recently in December 2018, the Court ruled that the right holds when a computer is shared with others.¹¹¹ Previously in December 2017, it extended the right to privacy to text (SMS) messages in a pair of companion cases; first, the court held that there could be a reasonable expectation of privacy in *received* text messages, where previously there had only been held to be such protection for sent messages.¹¹² In the second, the court held that the sender of text messages has a reasonable expectation of privacy in those texts, even when they are stored on the telecom

¹⁰⁰ Alex Boutilier, “Ottawa is ‘blurring’ lines on privacy as it looks for new ways to collect data: watchdog”, *The Star*, February 21, 2018, <http://bit.ly/2HN4G7I>.

¹⁰¹ “Draft OPC Position on Online Reputation,” January 28, 2018, <http://bit.ly/2Hu0M39>.

¹⁰² See e.g. Michael Geist, “Why the Canadian Privacy Commissioner’s Proposed Right to be Forgotten Creates More Problems Than it Solves,” January 29, 2018, at <http://bit.ly/2HsX1Lew>; and Allen Mendelsohn (this report’s author), “Surprise! Canada has had a Right To Be Forgotten all along!”, January 30, 2018, at <http://bit.ly/2EGzbht>.

¹⁰³ OPC, “Privacy Commissioner seeks Federal Court determination on key issue for Canadians’ online reputation”, OPC press release, October 10, 2018, <http://bit.ly/2vsTNCY>.

¹⁰⁴ 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, <http://bit.ly/2J6YJVX>.

¹⁰⁵ 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, <http://bit.ly/2JdujBo>.

¹⁰⁶ *Supra*, note 98.

¹⁰⁷ Alex Boutilier, “Facebook’s Zuckerberg and Sandberg named in unprecedented summons issued by MPs”, *The Star*, May 28, 2019, <http://bit.ly/2y3VpEu>.

¹⁰⁸ *Douez v. Facebook*, 2017 SCC 33, <http://bit.ly/2tt7BhT>.

¹⁰⁹ *Demers c. Yahoo! Inc.*, 2017 QCCS 4154, <http://bit.ly/2GIQxXM>.

¹¹⁰ *A.T. v. Globe24h.com*, 2017 FC 114 (CanLii), <http://bit.ly/2oalk9I>.

¹¹¹ *R. v. Reeves*, 2018 SCC 56, <http://bit.ly/2ISVHFC>.

¹¹² *R. v. Marakah*, 2017 SCC 59, <http://bit.ly/2GQgJjf>.

provider's computers.¹¹³

	2017	2018	2019
C7: Are individuals subject to extralegal intimidation or physical violence by state authorities or any other actor in retribution for their online activities? (0–5 points)	0	0	0

There were no documented cases of violence or physical harassment of internet users in Canada for their online activities during the report period. Cyberbullying, cyberstalking, and general online harassment, however, is on the increase, especially targeting young people.¹¹⁴ A recent study found that a quarter of Canadians have been subjected to some form of online harassment,¹¹⁵ and a recent report indicated that 37 percent of schoolchildren in one Canadian province had been subjected to cyberbullying.¹¹⁶ The government has recognized the seriousness of the issue, and announced it would release a coordinated strategy,¹¹⁷ though there has been little development.

The legal precedence of Canada's most noteworthy "revenge porn" case has taken on new significance. In a highly-praised landmark Jane Doe civil case in January 2016, a man who published revenge porn against his ex-girlfriend had been ordered to pay CAD \$100,000 to the victim who suffered severe emotional distress.¹¹⁸ In October 2016, however, that default judgment was set aside,¹¹⁹ and an appeal of this decision was denied.¹²⁰ 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 Jane Doe case, the new tort was applied in a November 2018 case, where an individual was found liable under the tort for posting a sexually-explicit video without consent on a pornographic website, and ordered to pay CAD 100,000 in damages.¹²¹ Furthermore, the Jane Doe case continues to be cited by other plaintiffs, authors, and courts.¹²²

Additionally, many provinces are passing laws that create civil torts for unauthorized distribution of intimate images and videos, such as Manitoba¹²³ and Alberta.¹²⁴ There also continue to be prosecutions 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.¹²⁵

¹¹³ *R. v. Jones*, 2017 SCC 60, <http://bit.ly/2GLIREc>.

¹¹⁴ Canadian Press, "More than 1 million young Canadians victims of cyberbullying, cyberstalking: StatsCan," *CBC News*, December 19, 2016, <http://bit.ly/2nzVw4g>.

¹¹⁵ Victor Ferreira, "More than a quarter of Canadians are subjected to harassment on social media, new poll finds," *National Post*, October 21, 2016, <http://bit.ly/2nnO0IY>.

¹¹⁶ "Nearly 4 in 10 schoolkids cyberbullied, B.C. government warns", *Metro*, February 6, 2018, <http://bit.ly/2HOCNMq>.

¹¹⁷ "Feds eye sexting, cyber violence strategy," *CBC News*, March 27, 2017, <http://bit.ly/2nzX4LX>.

¹¹⁸ *Doe 464533 v N.D.*, 2016 ONSC 541 (CanLII), <http://canlii.ca/t/gn23z>.

¹¹⁹ *Doe v N.D.*, 2016 ONSC 4920 (CanLII), <http://bit.ly/2oCQxj5>.

¹²⁰ *Doe 464533 v N.D.*, 2017 ONSC 127 (CanLII), <http://bit.ly/2HP3UGX>.

¹²¹ *Jane Doe 72511 v. Morgan*, 2018 ONSC 6607. See Omar Ha-Redeye, "Public Disclosure of Private Facts – Redux", *Slaw.ca*, November 11, 2018, <http://www.slaw.ca/2018/11/11/public-disclosure-of-private-facts-redux/>.

¹²² Ha-Redeye, *ibid.*

¹²³ *Intimate Image Protection Act*, C.C.S.M. c. 187, <http://bit.ly/2HKmdNE>.

¹²⁴ *Protecting Victims of Non-Consensual Distribution of Intimate Images Act*, S.A. 2017 ch. P-26.9, <http://bit.ly/2HOPczO>.

¹²⁵ See e.g. *R. v. P.S.D.*, 2016 BCPC 400 (CanLII), <http://bit.ly/2HMQVG0>, and *R. v. A.C.*, 2017 ONCJ 317, <http://bit.ly/2HNqQ9H>.

	2017	2018	2019
C8: Are websites, governmental and private entities, service providers, or individual users subject to widespread hacking and other forms of cyberattack? (0–3 points)	1	1	1

Cyberattacks and data breaches are becoming a serious issue in Canada. With a new mandatory requirement that private companies report data breaches to the OPC, they have seen a four-fold increase in the number of reports of such breaches.¹²⁶ It is unclear however whether the number of breaches is actually increasing, or the mandatory reporting requirement has simply caused more to be reported. In the past year, major Canadian companies have been subject to numerous attacks and data breaches, including the Bank of Montreal and the Canadian Imperial Bank of Commerce,¹²⁷ Canada Post,¹²⁸ and Canada's national airline, Air Canada.¹²⁹ In 2017 alone, more than one in five Canadian companies reported experiencing some sort of cyberattack.¹³⁰ During the same year, the government reported more than 200 serious data breaches of its systems.¹³¹

Government officials and departments continue to sound the alarm on the threat of cyberattacks in a number of areas. In April 2019, the Communications Security Establishment of Canada reported that foreign interference in Canada's upcoming federal election was "very likely."¹³² Additionally, the governor of the Bank of Canada has stated that cyberattacks are the most pressing concern for the financial system,¹³³ and the Deputy Privacy Commissioner has expressed similar concerns.¹³⁴

¹²⁶ Gregory Smolyne (Deputy Privacy Commissioner), "Appearance before the Standing Committee on Public Safety and National Security (SECU) on Cybersecurity in the Financial Sector as a National Economic Security Issue", April 3, 2019, <http://bit.ly/2J94raa>.

¹²⁷ Ms. Smith, "2 Canadian banks hacked, 90,000 customers' data stolen", *COS Online*, May 29, 2018, <http://bit.ly/2J81SVO>.

¹²⁸ Oriena Vuong, "Canada Post data breach affected 4,500 customers, OCS says", *Global News Online*, November 7, 2018, <http://bit.ly/2ISTDgG>.

¹²⁹ Maham Abedi, "Air Canada says 20,000 mobile app users affected by data breach", *Global News Online*, August 29, 2018, <http://bit.ly/2ISh9KY>.

¹³⁰ Bryan Borzykowski, "More than 1 in 5 Canadian businesses hit by cyberattacks: poll", *CPA Online*, December 12, 2018, <http://bit.ly/2ISx8Zt>.

¹³¹ Alex Boutilier, "Federal departments and agencies reported 200 serious privacy breaches in 2017", *Toronto Star*, December 23, 2018, <http://bit.ly/2IYb6Vp>.

¹³² Rachel Aiello, "Foreign interference in 2019 election 'very likely': report", *CTV News Online*, April 8, 2019, <http://bit.ly/2ISYJKa>.

¹³³ Andy Blatchford, "Threat of cyberattacks 'more worrisome than all the other stuff': Bank of Canada governor", *The Star*, October 26, 2017, <http://bit.ly/2HN05IN>.

¹³⁴ *Supra*, note 126.