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THE CRIC PAPERS

The Charter:
dividing
or uniting
Canadians?



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Highlights

- The Canadian Charter of Rights and Freedoms is viewed favourably by large majorities in all regions, with the highest rate of approval in Quebec (91%), and the lowest in the West (86%). Approval of the Charter is higher than in previous years.
- 71% say that the Court and not Parliament should have the final say when the Supreme Court declares a law unconstitutional because it conflicts with the Charter. This figure is higher than in previous years.
- A smaller majority (54%) opposes the Charter section that allows governments to override the courts and pass a law that the courts have declared unconstitutional. But a sizeable minority (41%) think that governments should have this power. In Quebec, 57% oppose the override.
- Despite its opposition in principle to the override clause, a majority (55%) thinks that the government should override the Supreme Court if the Court rules that the government's new anti-terrorism law violates some civil liberties.
- More generally, 66% agree that it is all right to suspend the usual civil rights, if the federal government says there is a national emergency, and a majority in Parliament agrees; 28 % disagree.
- A small majority of Canadians (56%) are prepared to give the police more power to detect and arrest criminals, even if it means the civil rights of some might not be respected. 41% take the opposite view.
- Significant numbers of Canadians are prepared to limit the protection of freedom of expression in certain circumstances, such as banning the spread of racial hatred (82%) or pornography that degrades women (68%).
- 61% feel that the Court was wrong to strike down the government's attempt to limit spending by interest groups on advertising supporting a party or candidate during an election campaign.
- 51% agree with the Court that an outright ban on tobacco advertising is too severe a restriction on the right to freedom of expression; 47% disagree.
- French-speaking families living outside Quebec should have the right to have their children educated in French, according to 86% of Canadians outside Quebec. In Quebec, 88% agree that English-speaking families should be able to have their children educated in English.
- Support for French-language education rights in western Canada (85%) is as high as it is in Ontario.
- A majority (55%) believes the Charter has united Canadians, making them more aware of common values, while 39% say it has divided Canadians because we have become too willing to push for our own particular rights regardless of the views of other people.

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- Canadians agree (78%) with the courts that the Charter's prohibition of discrimination should be extended to gays and lesbians. 20% disagree.
 - Only 11% say the Charter goes *too far* in protecting the rights of minority groups, and even fewer (6%) say this is true in the case of the rights of women.
 - 78% agree with the Supreme Court's decision that refugee claimants on Canadian soil have a right to a fair hearing. When told that this decision means longer delays for determining whether refugee claimants should be allowed to stay in Canada, a majority (60%) continues to support the Court.
 - 86% approve of the section in the Charter that calls for it to be interpreted consistent with the preservation and enhancement of Canada's multicultural heritage.

Preface

Canadians are deeply attached to the Charter of Rights and Freedoms. In recent years, nine out of ten surveyed have said the Charter is important to their sense of national identity. The Charter is seen as important to Canadian identity by more people than is the national anthem or the flag.¹

But it is more than a symbol. Early advocates of a constitutionally entrenched charter of rights saw it as the best way to protect both individuals and minorities by imposing firm limits on “the tyranny of the majority” and the state’s ability to interfere with personal freedom.

It also was hoped that a charter of rights would strengthen national unity in two important ways; unite Canadians of all origins through a powerful statement of shared political values; and defuse conflict between Anglophones and Francophones by providing constitutional protections for minority language and education rights.

That the Charter was intended to protect rights and strengthen national unity is manifest in Prime Minister Pierre Trudeau’s remarks at the ceremony where it was signed into law:

“I speak of a country where every person is free to fulfill himself or herself to the utmost, unhindered by the arbitrary actions of Government If individuals and minorities do not feel protection against the possibility of the tyranny of the majority, if French-speaking Canadians or native peoples or new Canadians do not feel they will be treated with justice, it is useless to ask them to open their hearts and minds to their fellow Canadians.”²

In the ensuing 20 years, Canadians have used the Charter frequently in defence of their rights and freedoms. In the process, however, the Charter has, on occasion, become the source of considerable controversy. It has provided the legal basis for court decisions on such divisive issues as abortion, assisted suicide, homosexuality, pornography, hate literature, police powers, the rights of the accused, and Quebec’s French language laws. Moreover, the many successful court challenges of government actions have led some to argue that the courts have become too “activist” – effectively displacing democratically elected legislatures as the forums in which key public policy disputes are settled.

¹ The exact question asked by Environics is: “How important are the following to the Canadian identity: very important, somewhat important, not very important or not at all important? The Charter of Rights and Freedoms.” The same question was asked about other items, including the national anthem and the flag. In 2000, the most recent year in which the question was asked, 94% of those surveyed said the Charter was important to the Canadian identity (source: Environics Research Group).

² Pierre Trudeau, speech on Parliament Hill, April 17, 1982, as quoted in Thomas Walkom, “Rights Charter Lauded by PM”, *The Globe and Mail* (Toronto), 19 April 1982, p. 10.

To mark the Charter's 20th anniversary, the Centre for Research and Information on Canada (CRIC) commissioned a national public opinion survey to measure what Canadians think about the Charter and how the courts have interpreted its specific clauses. The survey provides insight into how attitudes about the Charter have evolved.

METHODOLOGY

The survey was conducted on behalf of CRIC by Environics Research Group. Environics contacted 1,402 Canadians 18 years of age and over by telephone between February 11 and 17, 2002. Results for a survey of this size can be considered accurate to within plus or minus 2.6%, nineteen times out of twenty. The survey is the most extensive conducted on rights and freedoms in Canada since 1987.

ACKNOWLEDGEMENTS

The survey and this paper benefited from suggestions offered by a number of people. We would like to thank Donna Dasko, Joseph Fletcher, Jean-François Gaudreault-DesBiens, Matthew Mendelsohn, and Maurice Pinard for their contributions. CRIC also thanks Janet Hiebert and Paul Howe for their advice, and Environics Research Group for making available the results of some of their earlier surveys.

Overview

“While most Canadians have heard about it [the Charter of Rights and Freedoms], they have only the foggiest idea of what is in it. News reports make them aware that the Charter is being dealt with in the courts, but they do not have an overall perspective on how the judiciary is interpreting it or how these court rulings are influencing Canadian life.”³

There are some who worry about polling because they feel that the public is often poorly informed about the issues in question. They miss the point. Citizens are surveyed not because they are policy experts, but because they are the ones to whom governments are accountable. Opinion polls such as this one are report cards on the degree to which key elements of the political system enjoy public confidence. They also define the values and policy preferences that shape citizens’ political expectations and actions.

This survey is not intended to help settle disputes among legal scholars or constitutional experts, but to provide information about the public’s likes and dislikes when it comes to the Charter and the rights and freedoms that it guarantees. It identifies a number of different messages that the public is sending about this fundamental part of the constitution. These must be understood if governments, judges, lawyers and activists want to ensure that public confidence is maintained in Canada’s political and judicial system.

The first message is that the public strongly supports the Charter generally and many of the specific principles it upholds. Canadians overwhelmingly think that the Charter is good for the country. Over 70% are satisfied with

the extent to which the Charter protects their own rights. Particularly striking is the high level of support in all regions for the Charter’s clauses relating to official languages and multiculturalism, which suggests that bilingualism and multiculturalism are values now widely shared throughout Canada. Also striking is the fact that Canadians, almost unanimously, reject the notion that the Charter goes too far in protecting the rights of minority groups or women. In fact, Canadians are much more likely to say the Charter should go further than to say it does not go far enough.

This is welcome news to the Charter’s strongest supporters, but a second message gives pause. What are civil libertarians – that is, those who seek to minimize the state’s restrictions on individual freedom — to make of the fact that two thirds of those who consider the Charter “a good thing” also believe that government should be able to suspend civil rights in a national emergency? Or what should they make of these findings:

- a majority think the government should disregard any judgment that finds its new anti-terrorism law violates civil rights;
- a majority feels it is more important to give the police more powers to catch criminals than it is to ensure that civil rights are respected;
- a majority approves of court decisions upholding bans on some forms of pornography and hate literature.

³ Peter H. Russel, “Foreword”, in Ian Greene, *The Charter of Rights* (Toronto: James Lorimier & Company, 1989), vii.

From a civil libertarian viewpoint, Canadians don't appear to think that Charter rights are a good thing after all. Certainly, willingness to compromise on civil liberties contrasts with the robust support of bilingualism, multiculturalism, and the equality rights of minorities and women.

Charter guarantees are subject (under Section 1) to "reasonable limits" and in some cases (under Section 33) to an override on the part of Parliament and the provincial legislatures. Canadians seem to think that "reasonable limits" on rights is as good a thing as "rights" in and of themselves.

A third message – touching on the role of courts and legislatures – is somewhat mixed. On the one hand, the public strongly supports certain Supreme Court decisions that were vocally denounced by some experts, *e.g.* interpreting the Charter as prohibiting discrimination on the basis of sexual orientation, or extending full legal rights to refugee claimants. More than ever, Canadians are happy to let the Supreme Court, rather than parliament, have the final say when a law is found to violate the Charter. However, a growing minority is dissatisfied with the way the Supreme Court is working, and two in five approve of Section 33, which empowers governments to overrule the courts in certain Charter cases.

When Joseph Fletcher and Paul Howe investigated public attitudes towards the courts in 1999, they were prepared to conclude that "staunch critics who decry the judicial activism they see in recent Supreme Court decisions and call for greater deference from the courts have yet to win Canadians over to their point of view."⁴

The overall conclusion remains valid, but today the public's message is less one-sided. Moreover, a small majority thinks that the Charter has played more of a unifying than a divisive role in Canadian society, but two in five believe the reverse, suggesting that a significant minority is less than comfortable with the way the politics of rights is playing itself out in Canada.

Finally, the survey finds that public attitudes on rights and freedoms can shift, depending on the context. To take one notable example, in the face of a relevant counter-argument, majority support for Aboriginal treaty rights is transformed into majority opposition. For some, this indicates that the public's commitment to constitutional rights is so weak that many will abandon it when challenged. Others might conclude that the public is poorly informed, since many are prepared to change their minds when presented with more information. For others still, this indicates that, frequently, the public is caught up in "genuine predicaments" caused by the need to balance competing rights claims.⁵ Whichever is true, the message is clear: politics matters. Support for many of the rights and freedoms guaranteed by the Charter is not frozen, but fluid and subject to the influence of political debate. This means which voices are heard by the public, and which arguments ultimately win out, are of the utmost significance.

Given the scope and complexity of the issues it touches upon, it is not surprising that Canadians combine strong support for the Charter, both in principle and in practice, with some visible reservations.

⁴ Joseph F. Fletcher and Paul Howe, "Canadian Attitudes Toward the Charter and the Courts in Comparative Perspective," *Choices* Vol. 6, No. 3 (May 2000), p. 25. Available on the website of the Institute for Research on Public Policy at www.irpp.org.

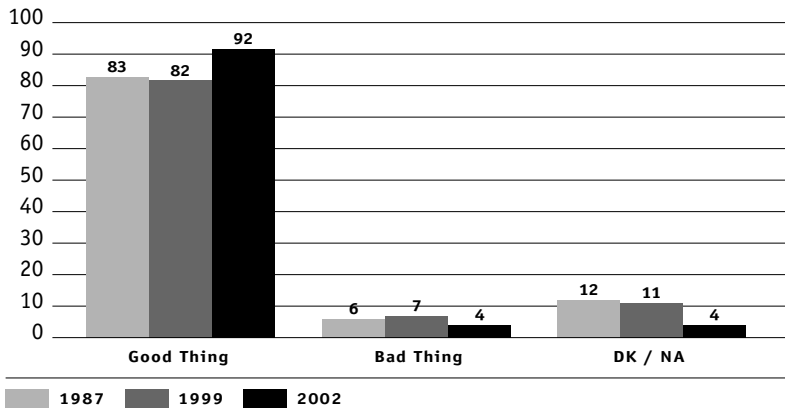
⁵ Paul M. Sniderman, Joseph F. Fletcher, Peter H. Russell and Philip E. Tetlock, *The Clash of Rights: Liberty, Equality and Legitimacy in a Pluralist Democracy* (New Haven, Yale University Press, 1996), p. 79; see also pp. 53-54.

1. The Charter in Principle

FIGURE 1 APPROVAL OF THE CHARTER

(Subsample: respondents who have heard of the Charter)

In general, do you think the Charter of Rights and Freedoms is a very good thing, a good thing, a bad thing or a very bad thing for Canada?



Source for 1987 and 1999: see note 7.

Previous surveys have established that “The Charter is well known and well liked all across Canada.”⁶ This is confirmed by the present study. Eighty-eight percent of Canadians have heard of the Charter, and the same number say it is a good thing for the country. Only 4% say the Charter is a bad thing for Canada. Approval is growing: among those who have heard of the Charter, 92% say it is a good thing — a 10-point increase over 1987 and 1999 (SEE FIGURE 1).⁷

The Charter is viewed favourably by large majorities in all regions. There is little difference between the highest rate of approval, in Quebec (91%), and the lowest, in the West (86%). Francophone Quebecers (91%) and Quebecers favourable to independence (92%) are equally likely to say the Charter has been good for Canada.

In addition, a large majority thinks that the Charter adequately protects their rights. When asked if it goes too far, not far enough, or just far enough to protect the rights of “Canadians like yourself,” 72% say it goes just far enough, compared with 18% who say it does not go far enough, and only 5% who say it goes too far.

⁶ Fletcher and Howe, “Canadian Attitudes toward the Charter and the Courts,” p. 7.

⁷ See Fletcher and Howe, “Canadian Attitudes toward the Charter and the Courts,” pp. 6-7.

1. THE CHARTER IN PRINCIPLE

In addition to this approval of the Charter in general, there is strong support for some of the specific principles that it upholds. For instance:

- 96% agree that “no matter what a person’s political beliefs, he or she is entitled to the same legal rights and protections as anyone else.”
- 86% approve of the section in the Charter that calls for it to be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.
- 78% say that the police should not be allowed to search someone’s home or office without a search warrant.
- 77% — including 70% outside Quebec — agree that it is important to preserve French and English as the two official languages of Canada.⁸

This is encouraging for Charter advocates. Yet it remains to be seen whether the high level of support for the Charter in general erodes when Canadian are asked more specific questions about Charter rights and the way these have been interpreted by the courts.

The Canadian Charter of Rights and Freedoms
Section 27: *This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.*

The Canadian Charter of Rights and Freedoms
Section 16 (1): *English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.*

⁸ The figure in Quebec is 98%. Quebecers are more likely than other Canadians to say that that preserving French and English as the two official languages of Canada is *very* important (rather than *somewhat* important): 82% of Quebecers hold this view, compared to only 34% of those outside the province. Thirty percent of Canadians living outside of Quebec say that preserving French and English as Canada’s official languages is not important.

2. The Charter in Practice

The Canadian Charter of Rights and Freedoms

Section 20 (1): *Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where a) there is a significant demand for communications with and services from that office in such language; or b) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.*

OFFICIAL LANGUAGES

The survey finds very high support for the Charter's specific guarantees relating to government services and minority language education.

- 73% of Canadians living outside of Quebec agree that French-speaking Canadians living in these provinces should have the right to federal government services in French.⁹
- Support for minority language education rights is even higher.¹⁰ Eighty-six percent of Canadians outside Quebec agree that French-speaking families living in their province should have the right to have their children educated in French. In Quebec, 88% agree that English-speaking families living in their province should

have the right to have their children educated in English. The similarity in the high level of support shown by Quebecers and by those outside Quebec for the education rights of their respective linguistic minorities is especially noteworthy.

- Support for French-language education rights in western Canada (85%) is as high as it is in Ontario. (By contrast, at 65%, support for the right to French-language services from the federal government is 11 points lower in the West than it is in Ontario.¹¹)

The Charter specifies that minority language education rights apply where the linguistic community is large enough to make the provision of minority language instruction feasible. However, even among those who are given no assurances about the numbers or the costs involved, support for minority language education rights remains very high. Specifically, support for French-language minority education rights is 81% among those respondents in the provinces outside Quebec who were *not* assured that the costs involved would be reasonable, compared with 91% for those who were.¹²

⁹ Not surprisingly, Quebecers (91%) are even more likely than other Canadians to say that French Canadians living outside that province should have this right.

¹⁰ The results reported here combined the results obtained from two slightly different questions, each asked to one-half of the survey sample. See note 12.

¹¹ The survey itself does not provide an explanation for this difference, but a likely explanation is that some of the traditional concerns associated with official bilingualism — such as the fear that employment in the federal public service will be closed to unilingual Anglophones, even in predominantly Anglophone areas of the country — arise only in the context of the right to French-language services and not that of the right to French-language education.

¹² Two differently-worded versions of the question were used. While one-half of respondents were asked if they supported the right to minority language education, the other half were asked if they supported it “as long as the number of French-speaking [in Quebec: English-speaking] children was large enough that this education could be provided at a reasonable cost.”

SEXUAL ORIENTATION

The Charter’s impact on issues relating to sexual orientation – notably, prevention of discrimination against homosexuals – is important for two reasons: the controversy generated by Charter cases dealing with sexual orientation, because of the strong feelings held by those in favour and those opposed to equality rights for homosexuals; and the fact that the legal protections extended to homosexuals have sometimes come as a result of court decisions and not legislation. For example, after declining to extend certain equality rights to homosexuals, the Alberta and Ontario governments were compelled to do so in order to comply with subsequent court decisions. Such developments have fuelled the criticism that the Charter has allowed the courts to eclipse legislatures in their role as the locus of social policy.¹³

Despite this, the survey finds striking public support for expanding the Charter’s scope so that it provides a measure of legal protection to homosexuals:

- 68% of Canadians say that the Charter should prohibit discrimination against, or guarantee equality to, gays and lesbians, while 27% say that it should not.¹⁴

The Canadian Charter of Rights and Freedoms
Section 23: (1) *Citizens of Canada a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province, have the right to have their children receive primary and secondary school instruction in that language in that province.*
 (2) *Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.*
 (3) *The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.*

The Canadian Charter of Rights and Freedoms
Section 15(1): *Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.*

¹³ Christopher Manfredi argues that the Alberta case alluded to here “represented the boldest step” in a process that has promoted the “transition from legislative to judicial supremacy in Canada.” Christopher P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, second edition (Don Mills: Oxford University Press, 2001), p. 5.

¹⁴ Two slightly different questions were asked, each to one-quarter of the survey sample. The first question was: “the Charter of Rights and Freedoms prohibits discrimination against women, ethnic and religious minorities and other groups. In your opinion, should the Charter also prohibit discrimination against gays and lesbians?” The second question was “the Charter of Rights and Freedoms guarantees equal rights for women, ethnic and religious minorities and other groups. In your opinion, should the Charter also guarantee equal rights for gays and lesbians?” The only difference between these two questions is that the first mentions the prohibition of discrimination, while the second mentions the guarantee of equal rights. But the two versions gave very similar results.

2. THE CHARTER IN PRACTICE

- A separate question explicitly mentioned the fact that the courts had already ruled that the Charter's prohibition of discrimination should be extended to prohibit discrimination against gays and lesbians.¹⁵ Seventy-eight percent of respondents agree with this ruling, while 20% disagree.

That support for Charter protections for gays and lesbians is higher when respondents are informed of the Court's position is worth nothing. It suggests that part of the public is willing to follow the Court's lead on this issue. It also indicates that the public is not necessarily disturbed by court decisions that directly alter public policy by expanding the scope of Charter rights.

The Canadian Charter of Rights and Freedoms
Section 2: *Everyone has the following fundamental freedoms: a) freedom of conscience and religion; b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; c) freedom of peaceful assembly; and d) freedom of association.*

FREEDOM OF EXPRESSION

The survey asked about two different court rulings that declared government legislation invalid because it violated freedom of expression.¹⁶ The first, recalling the Court's decision to throw out the government's ban on tobacco advertising, read as follows:

The government passed a law to prohibit the advertising of tobacco products to reduce the number of people in Canada harmed by tobacco. But the court said the law was unconstitutional because it violated the tobacco companies' right to freedom of expression. Do you agree or disagree with the court's decision?

Public opinion is split: 51% agree, but almost as many (47%) disagree. The public is clearly divided as to whether the right to freedom of expression necessarily outweighs other concerns. This is even more obvious in responses to the next question, which recalled the federal government's initially unsuccessful bid to restrict the amount of money that interest groups can spend on advertising supporting a political party or candidate during an election campaign:

The government passed a law to limit the amount of money that interest groups can spend on political advertising during an election campaign to prevent groups with a lot of money from having too much influence on an election. But the court said the law was unconstitutional because it violated the groups' right to freedom of expression. Do you agree or disagree with the court's decision?

¹⁵ This question was asked to the one-half of the survey sample that did not receive either of the two questions described in note 14.

¹⁶ The survey sample was split in half, and each group of respondents was asked one of the two questions.

A sizeable majority (61%) *disagree* with the Court, and only 37% agree.¹⁷

These responses show that a significant number of Canadians are prepared to compromise on freedom of expression, according to circumstances. As will be discussed in Part 3 of this paper, however, this does not necessarily put them at odds with the Charter.

THE RIGHTS OF REFUGEE CLAIMANTS

In 1985, the Supreme Court of Canada ruled that the Immigration Act was unconstitutional because it effectively denied refugee claimants the right to a fair hearing.¹⁸ As a result, they could be deprived of the “security of the person” in a manner that is not in keeping with principles of fundamental justice – a violation of Section 7 of the Charter. To comply with the ruling the government implemented new regulations that, among other things, gave claimants the right to appeal if their initial claim is rejected. This decision was applauded by refugee advocates, but criticized by others because it increases the time and cost of processing claims.¹⁹

The survey asked the following question:

A person claiming to be a refugee said his rights were violated because he was not given a fair chance to argue against the government’s decision to deport him from Canada. The Court agreed with him saying that everyone in Canada – including refugee claimants – has the right to a fair hearing. Do you agree or disagree with the Court’s decision?

Seventy-eight percent agree while 21% disagree.

The Canadian Charter of Rights and Freedoms
Section 7: Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

¹⁷ Disagreement with what the court actually said may not be as pronounced as the survey indicates. The court upheld the principle that governments can regulate interest group (or “third-party”) election spending, but said that the monetary limits imposed in the legislation before it were too low. This left the door open for the government to re-enact the legislation, so long as the spending limit was raised. This is what it has done, and the validity of the new legislation is currently before the courts. None of these details were raised in the survey.

¹⁸ Unlike other sections of the Charter, which speak of the rights of “every citizen of Canada” or of citizens and permanent residents, Section 7 accords its protection to “everyone.” The court took this to mean “every person physically present in Canada” – including refugee claimants. Accordingly, the court ruled that the immigration act *should* “provide the refugee claimant with an adequate opportunity to state his case and to know the case he has to meet” – but that it did not. Under the law, an application “will usually be rejected before the refugee claimant has even had an opportunity to discover the Minister’s case against him in the context of a hearing.” “Such procedures,” the court explained, “do not accord the refugee claimant fundamental justice and are incompatible with s. 7 of the *Charter*.” See: *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R.

¹⁹ Alex Macdonald, for instance, speaks of the “havoc” wreaked by the court’s “constitutional mischief.” Alex Macdonald, *Outrage: Canada’s Justice System on Trial* (Vancouver, Raincoast Books: 2000), pp. 66-68. See also Manfredi, *Judicial Power and the Charter*, p. 154.

2. THE CHARTER IN PRACTICE

However, as the authors of an earlier survey on the Charter argue, when assessing support for rights “it is necessary to take seriously the idea of political argument.” In the real world, people’s positions on issues such as this one will be challenged and subject to change. While it is valuable “to know whether citizens will support a fundamental democratic right in the absence of pressure, it is still more important to go on and to ask whether they will hold on to their positions in the face of pressure to change them . . . Where people start off politically matters, but what counts is where they wind up after the pushing and shoving of political argument.”²⁰

For this reason, the survey challenged respondents with two counter-arguments advanced by those who debated the Court’s decision in this case.

Respondents who had initially *agreed* with the Court were asked if they still felt this way even though the decision resulted in longer delays for determining whether refugee claimants should be allowed to stay. Seventy-seven percent said that they still supported the Court’s decision, but 20% did not. As a result, overall agreement with the Court dropped to 60% (SEE TABLE 1).²¹

Similarly, those who initially *disagreed* with the Court were asked if they would feel this way if ignoring the Court’s decision would make it more likely that genuine refugees might be deported from Canada. Two-thirds would still feel the same way, but 30% would not. As a result, agreement with the Court’s decision rises to 84%.

Public support for rights and freedoms is not set in stone – at least on issues such as these that are not currently on the top of the public’s agenda. In the refugee case, the level of agreement with the Court — initially at 78% — could in fact fluctuate between 60% and 84%, depending on what types of arguments for or against the Court’s decision might win the day.

TABLE 1 VARIATION IN SUPPORT FOR THE RIGHTS OF REFUGEE CLAIMANTS

	Overall response to initial question	Overall response after those initially <i>agreeing</i> with Court are presented with counter-argument	Overall response after those initially <i>disagreeing</i> with Court are presented with counter-argument
Agree with Court decision (%)	78	60	84
Disagree with Court decision (%)	20	36	14

²⁰ Sniderman, Fletcher, Russell and Tetlock, *Clash of Rights*, p. 55.

²¹ In other words, after the 20% of those who initially agreed are reclassified as disagreeing with the court’s decision, the remaining proportion in agreement is 60%.

ABORIGINAL RIGHTS

Section 35 of the Constitution recognizes and affirms the treaty rights of Aboriginal peoples.²² This section has come into play in a number of court decisions pertaining to Aboriginal rights to land, resources and self-government. One particularly controversial decision was that taken in 1999 in the case of Donald Marshall, a Mi'kmaq living in Nova Scotia who was arrested for fishing illegally. Marshall defended his actions by arguing that a treaty signed in 1760 gave his people the right to fish, and, by virtue of section 35, this right had constitutional status that gave it precedence over provincial laws regulating the fishery. The Supreme Court agreed.

The survey asked the following question:

An Aboriginal person was caught fishing without a license. The Court did not convict him because it said that a treaty between his people and the government gave him the right to fish. Do you agree or disagree with the Court's decision?

Fifty-seven percent of respondents agree and 41% disagree.

The Constitution Act, 1982

Section 35(1): *The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.*

It is notable that support for Aboriginal treaty rights is lower than support for the rights of official language minorities, for the Charter clause relating to multiculturalism, and for the prohibition of discrimination against homosexuals. This confirms that the "tolerance instinct" in Canada tends to reach its limits in the case of the distinct rights of Aboriginal peoples.²³

The significant regional variation in responses are worth noting. A majority (55%) in Atlantic Canada – the region where the fishing rights dispute arose – disagree with the Court while 43% agree. In Ontario, where support for Aboriginal rights has traditionally been highest, 67% agree with the court and only 30% disagree.

²² Section 35 of the Constitution Act of 1982, which relates to Aboriginal and treaty rights, is not part of the Charter of Rights and Freedoms. The Charter includes the first 34 sections of the 1982 Constitution Act.

²³ Darrell Bricker and Edward Greenspon, *Searching for Certainty: Inside the New Canadian Mindset* (Toronto, Doubleday Canada, 2001), pp. 276-78

2. THE CHARTER IN PRACTICE

Again, the survey challenged respondents with arguments for and against the decision. Those who agreed with the Court were asked if they would still feel this way if it meant that governments had to treat Aboriginal people differently from other Canadians when it comes to regulating access to natural resources like the fishery. This is important because research has shown that Canadians are strongly attached to the notion that governments must treat all citizens equally.²⁴ In the face of this argument, 70% of these respondents remain in agreement with the Court, but 27% say they now disagree. This means that, overall, a majority of respondents (56%) now *oppose* the Court's decision (SEE TABLE 2).

Those who initially disagreed were asked if they would still feel this way if the constitution said that treaties with Aboriginal peoples had to be respected. The relevant argument here is that many people may not realize that treaties are integral to Canada's constitutional law. In the face of this challenge, 62% of these respondents continue to disagree with the Court, but 35% changed their minds. Taking this into account, overall agreement with the Court rises to 71%.

Again, this demonstrates that support for rights varies in the face of political argument. Especially important in this case is the argument that all Canadians should be treated equally. The survey shows that, to the extent that this argument holds sway, the initial majority in favour of Aboriginal rights can be overturned. Conversely, to the extent that attention is drawn to the constitution's protection of treaty rights, public support for these rights will rise.

TABLE 2 | VARIATION IN SUPPORT ABORIGINAL RIGHTS

	Overall response to initial question	Overall response after those initially <i>agreeing</i> with Court are presented with counter-argument	Overall response after those initially <i>disagreeing</i> with Court are presented with counter-argument
Agree with Court decision (%)	57	40	71
Disagree with Court decision (%)	41	56	25

²⁴ The question of what constitutes "equal treatment" is a matter for debate. At the very least, however, Canadians are uncomfortable with what, rightly or wrongly, they see as preferential treatment for certain groups within Canadian society. Thus CRIC's Portraits of Canada 2000 survey found that only 30% of Canadians agreed that Aboriginal peoples should have some type of preferential access to hunting and fishing grounds in areas where they have traditionally lived, while 67% said that when governments regulate access to hunting and fishing grounds, they should treat everyone the same. See also Bricker and Greenspon, *Searching for Certainty*, pp. 276-78.

3. Reasonable Limits?

Under Section 1, Charter guarantees are subject to reasonable limits, provided these can be shown to be justified within the parameters of a free and democratic society. Thus, when a court agrees that a government law infringes on the Charter, it must determine whether that law, nonetheless, should stand because the infringement is reasonable and demonstrably justified in the name of a competing right, value or principle. This can be especially controversial because it requires judges to interpret what is or is not a “reasonable” infringement of Charter rights, and what rights are more important to society than others.

The survey shows that Canadians are at ease with the “reasonable limits” proviso. In particular, they are satisfied that it is reasonable to limit rights in order to protect vulnerable groups from harm.

Thus 85% approve of the law that prohibits the promotion of hatred toward a particular racial or religious group.²⁵

This support does not waver when respondents are asked a longer question that more clearly outlines the choice between the two competing objectives of countering racism and protecting freedom of expression. Eighty-two percent support the anti-hate law “because it makes it harder for racists to promote hatred against minorities” while only 15% oppose it on the grounds that “it limits freedom of expression.”²⁶

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

Given this, it is not surprising that Canadians also approve of a Supreme Court decision that invoked the limits under Section 1 in order to uphold a conviction under the law prohibiting the spread of racial hatred. Respondents were asked the following question:

Members of a political organization were convicted of publishing material that promotes hatred of other races. The Court ruled that it is more important to protect society from the harm caused by racial hatred than it is to protect the organization’s right to freedom of expression. Do you agree or disagree with the Court’s decision?

Eighty-two percent agree and only 16% disagree.

²⁵ The question was worded as follows: “It is currently against the law in Canada to write or speak in a way that promotes hatred toward a particular racial or religious group. Do you strongly approve, approve, disapprove or strongly disapprove of this law?” This question was asked to only one-half of the survey sample.

²⁶ This question was asked to those respondents (one-half of the sample) who did not get the question presented in note 25. The wording of the second question was: “It is currently against the law in Canada to write or speak in a way that promotes hatred toward a particular racial or religious group. Do you think that: 1) this is a good law because it makes it harder for racists to promote hatred against minorities, or 2) this is a bad law because it limits freedom of expression?”

3. REASONABLE LIMITS?

Similarly, over two-thirds of Canadians agree with the Supreme Court that it is right to ban certain forms of pornography even though this limits the right to freedom of expression. In this case, the question read to respondents was:

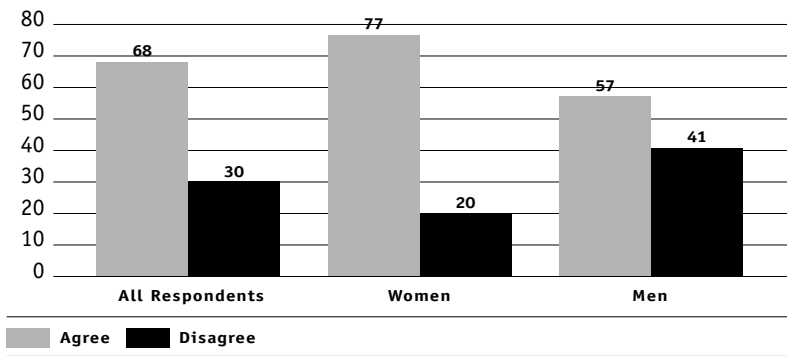
The owner of a store selling pornographic videos was convicted of distributing obscene material. The Court ruled that it is more important to protect society from the harm caused by pornography that degrades women than it is to protect the store owner's right to freedom of expression. Do you agree or disagree with the Court's decision?

Sixty-eight percent agree, and 30% disagree. Women are much more likely to agree with the Court than are men (SEE FIGURE 2). Agreement with the Court also increases with respondents' age.²⁷

These results should not be taken as an indication that Canadians do not support freedom of expression. Rather, they suggest that a majority recognizes the need to balance rights specifically guaranteed by the Charter, such as freedom of expression, with other rights or values deemed to be fundamental to a free and democratic society, such as equality and the protection of individuals and groups from harm.²⁸

FIGURE 2 | PORNOGRAPHY AND FREEDOM OF EXPRESSION

The owner of a store selling pornographic videos was convicted of distributing obscene material. The court ruled that it is more important to protect society from the harm caused by pornography that degrades women than it is to protect the store owner's right to freedom of expression. Do you agree or disagree with the court's decision?



The public is not only willing to restrict freedom of expression in certain circumstances, it also believes that it is acceptable for the government to impose broader limits on rights and freedoms in times of crisis. Two-thirds of respondents agree that it is all right to suspend the usual civil rights, if the federal government says there is a national emergency, and a majority in Parliament agrees. Twenty-eight percent disagree.

²⁷ Responses to the previous question dealing with the promotion of racial hatred did not vary according to respondents' sex or age.

²⁸ The survey also indicates that Canadians will not automatically defer to the Court's wisdom; they support the Court only when they think they strike the right balance between competing claims. Recall the opposition to the Court's decision overturning the limits on third-party election advertising, discussed above. In that case, a majority of respondents disagreed with the Court's decision that the limitation on the right of freedom of expression was *not* reasonable.

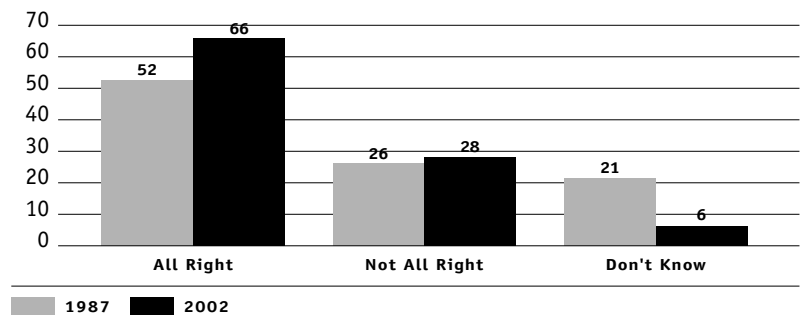
3. REASONABLE LIMITS?

The level of agreement is notably higher than it was when a similar question was asked in 1987. Then, only 52% agreed that it is all right to suspend civil liberties in a national emergency (SEE FIGURE 3).²⁹ In 1987, however, more people were undecided – suggesting that the very real emergency of September 11 prompted a number of previously unsure Canadians to give government the benefit of the doubt on suspending civil liberties.

The fact that Canadians are prepared to give the government considerable leeway is consistent with what is known about Canadian history. Invocation of the War Measures Act in 1970, for instance, met with public approval at the time,³⁰ and even with 10 years of hindsight, 58% of Canadians surveyed in 1981 said that the federal government’s decision was justified, and only 23% said it was unjustified (19% did not know).³¹

FIGURE 3 | SUSPEND CIVIL LIBERTIES?

If the federal government says there is a national emergency, and a majority in parliament agrees, is it all right or not to suspend the usual civil rights?



Source for 1987: see note 29. Note: the wording of the question asked in these years was slightly different.

²⁹ Sniderman, Fletcher, Russell and Tetlock, *Clash of Rights*, p. 38

³⁰ “The immediate responses to the imposition of the War Measures Act were heavily positive. The prime minister not only enjoyed popular support in the public opinion polls, but also won a near-unanimous parliamentary vote in which only NDP members dissented.” Sniderman, Fletcher, Russell and Tetlock, *Clash of Rights*, p. 37.

³¹ Source: Environics Research Group. The data were made available by the Canadian Public Opinion Archive at Queen’s University, Kingston, Ontario (<http://queensu.ca/cora>).

4. Parliament and the Courts

It is undeniable that the Charter has meant that the courts play a more prominent role in Canadian political life. Section 24 of the Charter and Section 52 of the 1982 Constitution widen the scope for the courts to entertain challenges to federal or provincial legislation, overturning laws when these challenges are well-founded.

have argued that “the Supreme Court now functions more like a *de facto* third chamber of the legislature than a court. The nine Supreme Court justices are now positioned to have more influence on how Canada is governed than are all the parliamentarians who sit outside of cabinet.”³³

The Canadian Charter of Rights and Freedoms

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

The Constitution Act, 1982

Section 52 (1): *The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.*

Opinions differ. Some argue that the only way to ensure that rights and liberties are fully protected is to give judges a free hand to review and to overrule the decisions of legislatures. Others contend that in adjudicating Charter cases, the courts have become too “activist” – that is, too willing to cast aside the laws duly enacted by elected legislatures. In some cases, the problem may not be judicial activism, but passive legislatures that duck controversial issues by letting matters work themselves out in the courts. As a result, policy-making on important matters such as minority rights or criminal law is taking place in the courts, rather than in legislatures that are elected and accountable to the people.³² Indeed, critics

JUDGING THE JUDGES

Most Canadians have confidence in judges. Sixty-six percent say they trust judges to do the right thing, either all or most of the time, compared with 34% who trust them either some of the time or hardly ever. By contrast, only 22% of Canadians trust politicians to do the right thing either all the time or most of the time, while 76% trust them either some of the time or hardly ever.

More importantly, a majority of Canadians (52%) are satisfied with the way the Supreme Court of Canada is working. One third, however, are dissatisfied, and 15% have no opinion.

But there is evidence that satisfaction with the Court is slipping. A survey conducted in 1999, six months after the Court handed down its judgment in the federal government’s reference on Quebec secession, found that as many as 76% of Canadians were satisfied with the way the Court was working, and only 16% were dissatisfied.³⁴ The much higher degree of satisfaction in this case is undoubtedly related to heavy publicity surrounding the reference, and the substance of the Court’s decision. Still, the drop in satisfaction is worrying for Court supporters.

³² See, for instance, E. Preston Manning, “A “B” for Prof. Russell,” *Policy Options / Options Politiques* Vol. 20, No. 3 (April 1999), p. 16.

³³ F.L. Morton and Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000), p. 58.

³⁴ See Fletcher and Howe, “Canadian Attitudes toward the Charter and the Courts.” The results cited above were communicated to CRIC by the authors. The sample size for this survey was 594.

4. PARLIAMENT AND THE COURTS

Further analysis suggests that, to some extent, satisfaction with the Court is tied to how Canadians feel about their economic prospects or life situation, meaning that in some cases dissatisfaction with the Court may reflect general malaise and not necessarily strongly-held views about how judges interpret the law.

At the same time, satisfaction with the way the Supreme Court is working is also closely tied to attitudes on at least two other issues: gay rights; and the rights of the accused. Those who oppose legalizing same-sex marriage,³⁵ who think that police are unduly hampered by the need to worry about the rights of criminals, or who favour greater police powers, even at the expense of civil rights, are also more *dissatisfied* with the Court. This suggests that decisions relating to these issues may well have affected the level of support that more socially conservative Canadians have for the Court.

AGREEMENT WITH COURT DECISIONS

That a majority is satisfied with the Supreme Court and trust judges to do the right thing does not mean that Canadians always take the Court's side. Six different questions were asked about specific judgements. The level of agreement with the Court varies considerably from case to case (from 82% to 37%) (SEE TABLE 3).³⁶

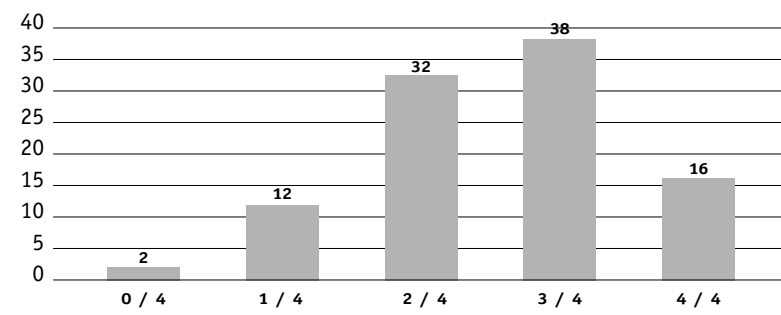
This is confirmed by the more detailed analysis in FIGURE 4. Since some of the six questions about specific court decisions were asked to only one-half of the survey sample, each individual respondent was asked four questions

TABLE 3 | AGREEMENT AND DISAGREEMENT WITH COURT DECISIONS

Court Judgment	Agree with Court (%)	Disagree with Court (%)	Sample Size
Uphold prohibition of hate litterature	82	16	711
Refugee claimants have right to fair hearing	78	21	1,402
Uphold restrictions on pornography	68	30	691
Uphold Aboriginal treaty rights	57	41	1,402
Overturn ban on tobacco advertising	51	47	715
Overturn limit on "third party" election advertising	37	61	687

FIGURE 4 | AGREEMENT WITH COURT DECISIONS

Each survey respondent was asked to agree or disagree with four separate decisions taken by the courts. This figure shows the proportion agreeing with none, one, two, three or four of the court decisions about which they were asked.



³⁵ The current survey shows that 53% of Canadians support allowing gay and lesbian couples to marry, while 40% are opposed. The number strongly opposed (21%) is greater than that strongly in favour (15%).

³⁶ In interpreting these figures, we do not place a great deal of weight on the fact that a majority of respondents agreed with the court on five of the six specific questions asked in the survey. The six questions were not intended to be representative of the overall pattern of decision-making by the courts. Arguably, had the questions touched on other cases, the results could have been different. Thus, we are drawing attention only to the responses to the individual cases raised in each of the questions, and to the fact that Canadians on the whole tend to agree with the court in some cases but disagree in others.

4. PARLIAMENT AND THE COURTS

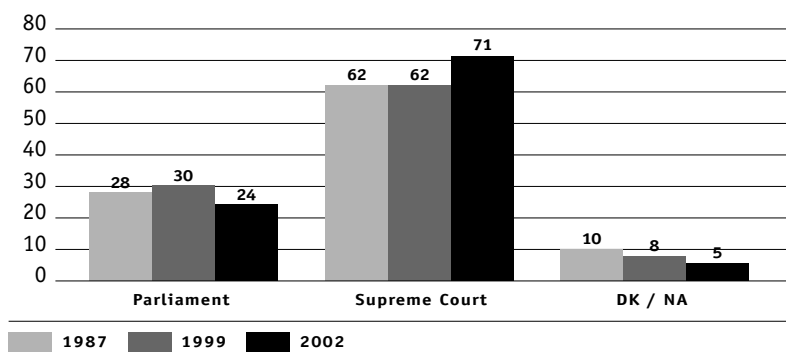
TABLE 4 FACTORS INFLUENCING AGREEMENT WITH COURT DECISIONS

(Table shows the percentage of those holding each view who agree with the Court in a given number of the cases about which they were asked. Note that none of these cases touched on the issues of gay rights or police powers.)

	Agree with court in 0 or 1 out of 4 cases	Agree with court in 3 or 4 out of 4 cases
Charter is a good thing	13	55
Charter is a bad thing	28	37
Satisfied with Supreme Court	12	58
Dissatisfied with Supreme Court	17	46
Support same-sex marriage	11	58
Oppose same-sex marriage	17	48
Respect civil liberties even if some criminals go free	11	61
More police power even if less civil liberties	16	49

FIGURE 5 WHO DECIDES?

When Parliament passes a law but the Supreme Court of Canada says it is unconstitutional on the grounds that it conflicts with the Charter of Rights, who should have the final say, Parliament or the Supreme Court?



Source for 1987 and 1999: Fletcher and Howe, "Canadian Attitudes Toward the Charter and the Courts," p.11. Note: the wording of the question asked in these years was slightly different.

in total. Very few respondents disagreed with the Court in each of the four cases with which they were presented; relatively few (only 16%) agreed with the Court every time. Eighty-two percent of Canadians agreed with the Court in some instances and disagreed with it in others.

While those who are satisfied with their own life situation are more likely to express general satisfaction with the Court, they are *not* more likely to agree with particular court decisions. But other factors do influence the tendency to agree to disagree with the courts (SEE TABLE 4). Approval of the Charter and levels of satisfaction with the Supreme Court play a role. More specific factors are the respondent's position on same-sex marriage and the need for greater police powers. Those who oppose same-sex marriage and who favour greater police powers, even at the expense of civil liberties – who were earlier seen to be more likely to be dissatisfied with the Court – are also more likely to disagree with the Court's decisions in other kinds of cases that they were asked about. This suggests that some Canadians (albeit a minority) hold values that lead them to be more distrusting of the Court, or at least less inclined to defer to the Court's wisdom in the cases discussed in the survey.

THE COURTS VS. PARLIAMENT: WHO DECIDES?

Whether in the process of interpreting the Charter, the courts have come to play too big a role in making public policy and have encroached on the prerogatives of Parliament and the provincial legislatures has been the object of much debate. Most Canadians, however, are comfortable with the Court acting as the final arbiter: 71% say that if the Supreme Court declares a law unconstitutional because it conflicts with the Charter, the Court, and not Parliament, should have the final say. Only 24% would give Parliament the final say. Moreover, the proportion giving the final

say to the Court is larger now than in previous years (SEE FIGURE 5). As the authors of a previous study put it, “Canadians continue to show strong respect for the right of the courts to strike down legislation they deem unconstitutional... [T]here is no evidence that a groundswell of opposition to judicial authority is in the offing.”³⁷

SECTION 33

The Supreme Court of Canada does not always have the final say. Section 33 – the famous “override” or “notwithstanding” clause of the Charter — allows Parliament or a provincial legislature to temporarily suspend the application of certain other sections of the Charter to uphold a law that, otherwise, would be found to be unconstitutional because it violates one of those sections.³⁸ In some cases, Section 33 allows Parliament (or a provincial legislature) to re-enact a law that the courts have thrown out. This happened in Quebec in 1988, when the provincial government invoked Section 33 to pass its French-only outdoor sign law, even though the Supreme Court had declared that such a law violated the right to freedom of expression.

Some have speculated that, outside Quebec at least, Section 33 has become unusable because public commitment to the Charter is so strong.³⁹ Any attempt by a government to override Charter rights would be political suicide.⁴⁰

The Canadian Charter of Rights and Freedoms
Section 33 (1): *Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.*

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

³⁷ Fletcher and Howe, “Canadian Attitudes toward the Charter and the Courts,” p. 25.

³⁸ Section 33 can be invoked to override the Charter’s guarantee of fundamental freedoms (Section 2), legal rights (Sections 7 to 14), and equality rights (Section 15).

³⁹ Howard Leeson argues that “section 33 now appears to be a paper tiger. It may become the equivalent of the powers of reservation and disallowance, available in theory, but not used in practice.” Leeson, however, doubts that the public opposition is main reason why legislatures have shied away from using Section 33. See Howard Leeson, “Section 33, the Notwithstanding Clause: A Paper Tiger?” *Choices* Vol. 6, No 4 (June 2000), pp. 17-20. Available on the website of the Institute for Research on Public Policy at www.irpp.org. Christopher Manfredi gives more weight to public disapproval of the Section. See Manfredi, *Judicial Power and the Charter*, pp. 181-188.

⁴⁰ This view was strengthened after the experience of the Alberta government, which in 1998 announced that it would invoke the notwithstanding clause to pre-empt legal challenges to a law establishing a monetary limit to the amount of compensation to be paid to mentally handicapped Albertans who had been sterilized without their consent. The public reaction against the intended use of Section 33 was so swift and strong that the government withdrew the proposal the next day.

4. PARLIAMENT AND THE COURTS

The survey suggests that the extent of public opposition to Section 33 may be overstated.

A majority of Canadians (54%) *do not* think that governments should be able to overrule the courts by passing a law that the courts have declared unconstitutional because it violates the Charter of Rights and Freedoms. But a sizeable minority (41%) think that governments *should* have this power, meaning that Canadians are as divided on the issue as are the country's legal experts. Here are some key survey findings about Section 33:

- There is no significant regional difference of opinion on this question. However, given the Quebec Government's past use of Section 33, it is notable that Quebecers are among those most *opposed* (57%) to the override clause in the Charter. Supporters of Quebec independence are even more opposed than other Quebecers.
- Women are more opposed to the override than men. Fifty-eight percent of women think that governments should not have this power, compared to 35% who think that they should. Men are more evenly divided, with 50% opposing the power and 48% supporting it.
- Support for the override is more pronounced among those who are most likely to be uncomfortable with certain aspects of the Charter and the courts' interpretation of its meaning. Specifically, support is higher among those who think the Charter goes too far in protecting the rights of minority groups or of women, or among those opposed to the Charter prohibiting discrimination on the grounds of sexual orientation.
- 23% of those who would give the final say to Parliament where laws conflict with the Charter think that Parliament *should not* have the power to pass a law that the courts have declared unconstitutional. These respondents change their minds about Parliament having the "final say" when it is made clear that this means Parliament would be allowed to overrule court decisions.
- By the same token, 32% of those who say that the Supreme Court should have the final say believe, nevertheless, that governments should have override authority — suggesting that these respondents believe that there can be exceptions to the general rule.

TABLE 5 | SAME-SEX MARRIAGE AND SECTION 33

If the Supreme Court said that the government had to give gays and lesbians the right to be married, do you think that the government should or should not use its power to overrule the Court's decision?

	Average for all respondents	Respondents who support allowing gay and lesbian couples to marry	Respondents who oppose allowing gay and lesbian couples to marry
Government should overrule the Court	28%	12%	51%
Government should not overrule the Court	67%	85%	44%

Beyond what respondents think about Section 33 in principle, two further questions were asked to examine attitudes about the override in practice. The first was:

If the Supreme Court said that the government had to give gays and lesbians the right to be married, do you think that the government should or should not use its power to overrule the court's decision?

4. PARLIAMENT AND THE COURTS

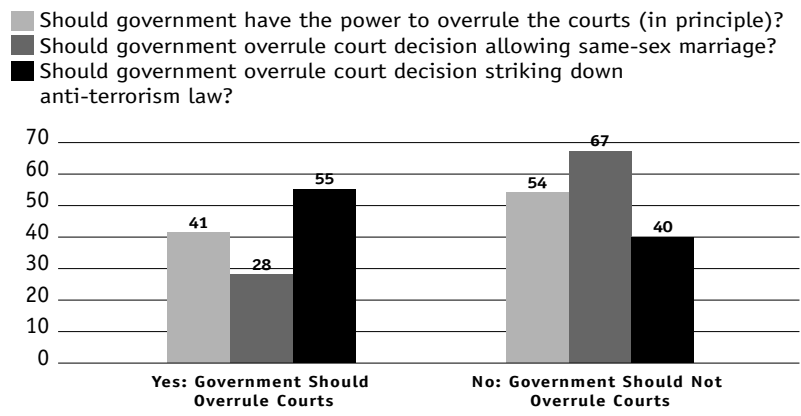
Sixty-seven percent reply that the government should not overrule the Court, while 28% say it should. Those who oppose same-sex marriage are much more likely to say the government should override a court decision allowing it (SEE TABLE 5). At the same time, however, 44% of those who oppose same-sex marriage reject the idea that the government should use its power to overrule the courts in this case.

The second question read as follows:

If the Supreme Court said that the government's new anti-terrorism law violated some civil liberties, do you think that the government should or should not use its power to overrule the Court's decision?

A majority (55%) say that the government should overrule the courts, while 40% say it should not. (While a majority favour using Section 33, civil libertarians might be reassured that, even in the present context of heightened concerns about terrorism, two in five would not allow the government to overrule a court decision striking down the anti-terrorism law.) The government's use of its power to overrule the courts *in this specific case* is supported by 44% of those who opposed Section 33 in principle.

FIGURE 6 | THE USE OF SECTION 33



Three important conclusions can be drawn:

1. Opinions about Section 33 vary depending on the issue at hand (SEE FIGURE 6).
2. It may be wrong to assume that a government's use of the override will necessarily put it at odds with public opinion. A majority opposes the use of Section 33 in principle, but not always in practice.
3. The public is quite divided on using Section 33. The majority opposing it, in principle, is small, as is the majority who support its use in the case of the anti-terrorism law.

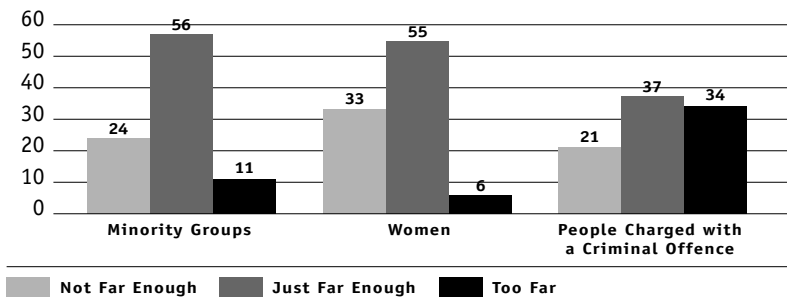
5. Does the Charter Go too Far?

While Canadians are almost unanimous in saying that the Charter is a good thing for the country, some might also be anxious about the extent to which it has been used by certain groups to advance their particular interests. There may also be growing anxiety about how Canadian society and politics have changed as a result of the accentuated “rights consciousness” fostered by the Charter. This section explores these hypotheses.

Previous surveys by Environics have shown that most Canadians believe that the Charter has improved the rights of minority groups, but only a minority say the same is true of their own personal rights.⁴¹ The present survey adds that a majority of Canadians agree that the level of protection that the Charter has provided to minority groups is appropriate. In fact, 24% would like the Charter to go *further* in protecting these groups. Thus, if Canadians feel that the Charter has been of particular benefit to the rights of minority groups, it is likely that they believe that these groups are most in need of protection. Indeed, only 6% say the Charter goes too far in protecting the rights of women. This figure can be seen as a strong vote of confidence, especially in light of the publicity generated by Charter cases relating to matters such as human reproduction, pornography, and prosecution of those charged with sexual assault.

FIGURE 7 | THE CHARTER: TOO FAR, OR NOT FAR ENOUGH?

In your opinion, does the Charter of Rights and Freedoms go too far, not far enough, or just far enough to protect the rights or each of the following?



EQUALITY RIGHTS

Canadians *do not* think the Charter unduly favours those groups who have relied on it to protect their equality rights. Respondents were asked whether the Charter goes too far, not far enough, or just far enough to protect the rights of minority groups and of women. In each case, a majority says the Charter goes just far enough, and a sizeable minority – between one-quarter and one-third – says it does not go far enough (SEE FIGURE 7). Very few people think the Charter goes too far in protecting the rights of minority groups or women.

LEGAL RIGHTS

Some of the harshest criticism leveled against the Charter and the courts’ interpretations of its provisions relates to protections afforded to suspected criminals. Disbelief and outrage have been fueled by the occasional dismissal of charges against an accused on the basis of what many see as a “technicality,” such as a minor transgression of Charter rights by the police or the prosecution. Such instances have prompted critics to argue that such court rulings have “transformed” criminal justice procedures “to the chagrin of the police and to the delight of criminal lawyers and their clients.”⁴²

⁴¹ In 1999, for instance, 61% said that the rights of minority groups had improved as a result of the Charter of Rights and Freedoms, while 20% said they had not changed and only 7% said they had deteriorated. When asked about their own personal rights, 26% said they had improved, 40% said they had not changed, and 15% said they had deteriorated. Source: Environics Research Group.

⁴² Morton and Knopff, *Charter Revolution*, p. 20. Similarly, Alex Macdonald alleges that law enforcement officers “have had their daily work hamstrung” as the Charter rights of accused are “propped up to extraordinary heights” by judges allergic to common sense. Macdonald, *Outrage*, p. 29 and 56.

5. DOES THE CHARTER GO TOO FAR?

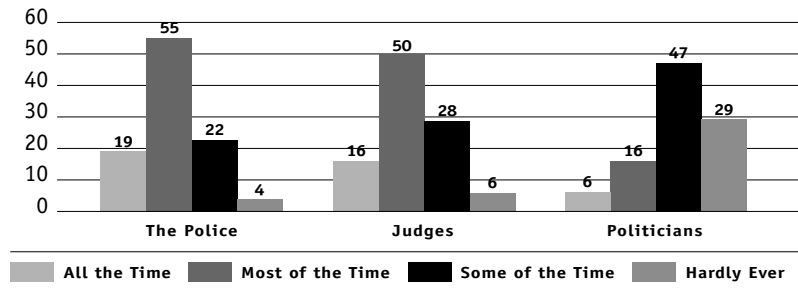
As shown above in FIGURE 7, however, only one in three Canadians say that the Charter goes too far in protecting the rights of people charged with a criminal offence. Still, this represents many more than those who think that the Charter goes too far to protect minority groups or women, indicating that the issue of legal rights raises more concerns that does that of equality rights.

In fact, there is ample evidence that the public sympathizes with the police in the fight against crime:

- First, the public trusts the police more than judges and politicians. Almost three-quarters of Canadians trust the police to do the right thing either all or most of the time (SEE FIGURE 8).
- Second, 69% of Canadians agree with the statement that “one reason there is so much crime in Canada is that the police and the courts have to spend too much time worrying about the rights of criminals.” Only 29% disagree.
- Finally, the most revealing finding is that a majority (56%) is prepared to give the police more power to detect and arrest criminals, *even if that means that the civil rights of some Canadians might not be respected*. Forty-one percent take the opposite view, preferring that the police respect everyone’s civil rights, even of that means that some criminals might escape detection.

FIGURE 8 | A MATTER OF TRUST

Do you trust each of the following to do the right thing all the time, most of the time, some of the time, or hardly ever?



These results support an earlier study which found “overwhelming evidence of opposition to judicial decisions” that had the effect of limiting the police’s ability to obtain evidence against criminal suspects.⁴³ And the readiness to compromise on legal rights in order to empower the police contrasts sharply with the survey’s finding of much stronger public support for Charter protections of minority or equality rights.

On the other hand, as we have seen, rather than thinking that criminal suspects as a rule have too many rights, a majority of Canadians (57%) say that the Charter either goes *just far enough* or *not far enough* to protect the rights of those charged with a criminal offence. Moreover, two out of five would prefer to see the police uphold civil rights, even at the cost some criminals going free. And, earlier in the paper, we noted that 78% percent of Canadians say that the police should not be allowed to enter and search someone’s home or office without a search warrant. This question, however, was asked of only one-half of survey respondents.

⁴³ Fletcher and Howe, “Canadian Attitudes toward the Charter and the Courts,” p. 37.

5. DOES THE CHARTER GO TOO FAR?

The other half was asked about searches of a *suspected criminal's* home or office. In this case, 65% say that police should not be allowed to search without a warrant. Although fewer people would restrict police powers in a case involving someone suspected of a crime, almost two thirds would prohibit what the courts would surely view as an unreasonable search of a suspect's home or office.

The Canadian Charter of Rights and Freedoms
Section 8: *Everyone has the right to be secure against unreasonable search or seizure.*

It is wrong to conclude, therefore, that the public does not support the Charter's protection of legal rights. It is perhaps more accurate to recognize that the public supports these rights in principle, but not always in practice. Canadians will continue to be frustrated in cases where they perceive that an overly legalistic interpretation of rights unduly limits the ability of the police and the courts to arrest, prosecute and convict genuine criminals. In the context of this frustration, they will be willing to compromise rights in return for security.

COMMON VALUES?

The Charter was intended to do more than protect rights and liberties. Many of its supporters hoped it would also "strengthen the country's unity by basing the sovereignty of the Canadian people on a set of values common to all."⁴⁴ But critics argue that, in practice, the Charter has been divisive, fracturing the country into rights-seeking groups who eschew political compromise in favour of winner-take-all court battles. The result has been to "embitter politics" and to leave Canadians "less of a single people" than we were before.⁴⁵

In view of this argument, respondents were read the following two statements about the Charter, and asked to state which was closer to their own view:

- 1) *the Charter's protection of our rights and freedoms has united Canadians because we have become more aware of the values that we have in common; or*
- 2) *the Charter of Rights and Freedoms has divided Canadians because we have become too willing to push for our own particular rights regardless of the views of other people.*

A majority (55%) says that the Charter has united Canadians by making us more aware of common values. However, 39% say that it has divided us, as we have become too focused on our own particular rights. The modest majority seeing the Charter as more unifying than divisive contrasts with the overwhelming majority who would say that it is important to Canadian identity and that it is a good thing for the country.

⁴⁴ Pierre Elliott Trudeau, "The Values of a Just Society," in Thomas S. Axworthy and Pierre Elliott Trudeau, eds., *Towards A Just Society: The Trudeau Years* (Markham: Viking, 1990), p. 363.

⁴⁵ Morton and Knopff, *Charter Revolution*, pp. 150-51; 166.

5. DOES THE CHARTER GO TOO FAR?

Views about the unifying or divisive effect of the Charter are closely linked to attitudes about a wide range of specific issues relating to rights and freedoms.⁴⁶

The tendency to say that the Charter has united Canadians is higher among those who:

- Insist that the police should respect civil rights, even if some criminals might escape arrest;
- Disagree that the Charter goes too far to protect the rights of minority groups;
- Favour allowing gay and lesbian couples to marry;
- Agree with the Court that the Charter should prohibit discrimination against gays and lesbians;
- Approve of the clause in the Charter relating to multiculturalism;
- Agree with the Court's decision to uphold Aboriginal treaty rights;
- Say that it is important to preserve English and French as Canada's two official languages;
- Agree that French Canadians living outside Quebec should have the right to federal government services available in French;
- Favour the constitutional recognition of Quebec's unique character.

Those who take the opposing view are more likely to say that the Charter has divided Canadians because we have become too willing to push for our own particular rights regardless of the views of others.

Thus, those who are less likely to say that the Charter has made us more aware of our "common values" – such as bilingualism, multiculturalism, equality rights, minority rights, and civil liberties — are precisely those who are less likely to agree that those values are in fact commonly held. There is a constituency of people within Canada who, because of their views, are concerned about the direction in which the Charter (and judicial interpretation of Charter rights) is taking the country. What the present study cannot tell us – and what future research should address — is whether this constituency is growing or shrinking with time.⁴⁷

While this finding is important, it should not overshadow the strong overall support for the Charter and its provisions. Nor should it eclipse the majority view that the Charter does not "go too far," and, in fact, has united Canadians, making them more aware of common values.

⁴⁶ Also, those who are less optimistic about the economy and less secure about their own employment are less likely to see the Charter as promoting unity.

⁴⁷ There are indications, however, that over time, Canadians are becoming more supportive of some of the values just mentioned. For instance, Canadians as a whole are becoming more liberal in their attitudes towards homosexuality (see Bricker and Greenspon, *Searching for Certainty*, pp. 267-68). Note that, according to the survey under consideration here, support for a Charter prohibition against discrimination on the basis on sexual orientation is much greater than that measured by Environics in the mid-1990s. Environics also confirms that support for "bilingualism in all of Canada" is higher today than at any time in the previous 25 years (source: Environics Research Group).

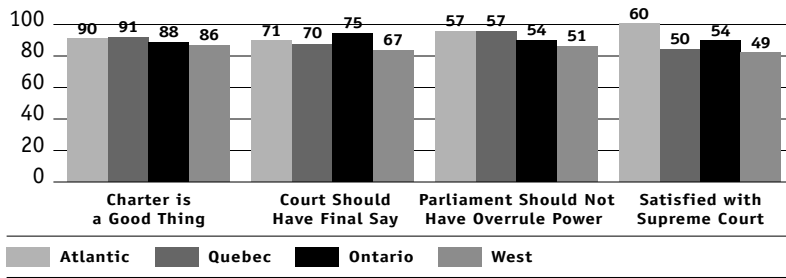
6. National Unity Revisited

One of the most important findings of the survey is the lack of any significant regional differences of opinion on the Charter's legitimacy or the relationship between Parliament and the courts. Canadians in each of the country's major regions have the similar views on these key issues: whether the Charter is a good thing for Canada; whether Parliament or the Supreme Court should have the final say when laws conflict with the Charter; whether Parliament should have the power to overrule the Court's decisions; and on whether the way the Supreme Court is working is satisfactory (SEE FIGURE 9).

It would appear that the Charter and the role of the courts are not regionally divisive issues. What's more, large majorities in every region support Charter principles relating to bilingualism and minority language education rights, multiculturalism, the acceptability of "reasonable limits" on freedom of expression, and the prohibition of police searches without a search warrant. The Charter does indeed speak to certain fundamental values upon which all Canadians can agree.

If we look more closely at the other results of the survey, however, some distinct regional patterns do emerge.

FIGURE 9 OPINION ON THE CHARTER AND THE COURTS, BY REGION



First, Quebecers tend to be more supportive of equality as a principle, and of groups seeking greater equality in practice. Quebecers are much more likely than other Canadians to say that equality is more important than personal freedom (SEE TABLE 6).

Quebecers are also more likely to favour allowing same-sex marriage, to support the prohibition of discrimination against gays and lesbians, and to say that the Charter has not gone far enough to protect minorities and women (SEE FIGURE 10). Western Canadians are least supportive of "gay rights," and are least likely to say the Charter has not gone far enough to protect minority groups and women. The degree of regional difference should not be exaggerated, however. In the case of Charter protection for gays and lesbians, for instance, a majority in all regions agree.

TABLE 6 FREEDOM VS. EQUALITY (PERCENTAGE AGREEING WITH EITHER STATEMENT)

	Atlantic	Quebec	Ontario	West
Both freedom and equality are important. But I consider personal freedom to be more important, that is, everyone can live in freedom and develop without hindrance.	51	39	54	54
Both freedom and equality are important. But I consider equality to be more important, that is, nobody is underprivileged and social class differences are not so strong.	40	59	43	44

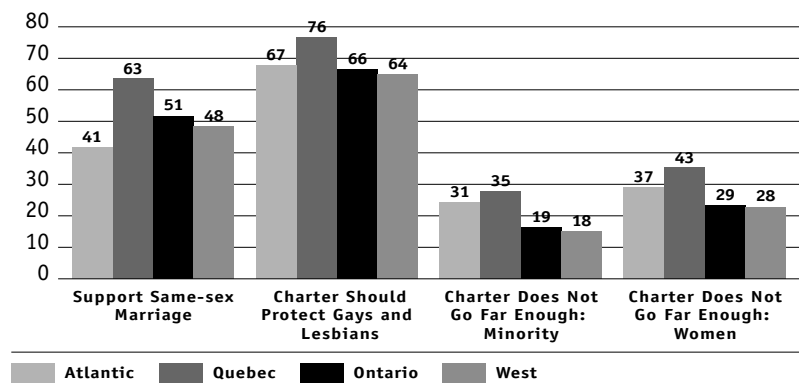
Quebecers also take a somewhat different view of police powers and civil liberties.⁴⁸ For example:

- 61% agree that one reason there is so much crime in Canada is that the police and the courts have to spend too much time worrying about the rights of criminals, compared to 72% of Canadians living in the other nine provinces;
- 71% say that the police *should not* be allowed to enter and search a criminal suspect’s home or office without a search warrant, compared with 63% of those outside Quebec;
- 57% think that it is all right for the federal government to suspend civil liberties in times of national emergency, compared with 68% outside Quebec;
- 85% agree with the court decision giving refugee claimants the right to a fair hearing, compared with 75% outside Quebec;

Quebecers are also much less trusting of the police and of judges than are other Canadians, and less likely to say that it is *very* important to strengthen respect and obedience to authority.

The tendency of Quebecers to be more supportive of civil liberties is apparent in all but two cases. The more widely held view in Quebec that the Charter goes too far to protect the rights of people charged with a criminal offence may be shaped by the ongoing debate in the province about whether the Charter places too many

FIGURE 10 ATTITUDES ON EQUALITY, BY REGION



obstacles in the way of the fight against organized crime. And Quebecers are just as likely as other Canadians to agree that the government should have the power to overrule the courts, should the courts find that the new anti-terrorism law violates some civil liberties.

Finally, while it is true that there are no significant regional divisions in attitudes on the Charter, it is worth noting that western Canadians, particularly those living in the Prairie provinces, appear least satisfied. Only 48% of Prairie residents say that it has united Canadians by making them more aware of the values held in common, compared with 57% of those in the other provinces. Forty-eight percent of Prairie residents are satisfied with the way the Supreme Court is working while 43% are dissatisfied, whereas 53% of other Canadians are satisfied and 31% are dissatisfied. The question for future research is whether, in time, this difference of opinion will narrow or widen.

⁴⁸ Quebec is singled out for attention here because the responses of Quebecers to these particular questions are consistently different from those of Canadians in other regions. On these questions, Canadians from the Atlantic provinces, Ontario and the West give similar responses.

A Final Word

A central objective for the framers of the Charter was to strengthen national unity by focusing Canadians of all backgrounds on the political values they hold in common. The survey provides dramatic proof that they succeeded. The Charter speaks to values widely shared by Canadians, and in the space of two decades, it has become an important symbol of national identity. Moreover, what Canadians like most about the Charter are precisely those aspects that underpin the maintenance of unity – protection of official languages, multiculturalism, and equality rights. The Charter defines the very ideal of Canada: a pluralist, inclusive and tolerant country, one in which all citizens can feel equally at home.

Certainly, the Charter, and the courts' interpretations of its clauses, will generate ever more controversy. Modern societies currently are grappling with difficult issues: advances in medical research; the impacts of information technology; changes in family structure and relationships; the evolution of social mores; political mobilization of disadvantaged groups of citizens; and the growing sophistication of criminals and terrorists. Government attempts to confront these challenges inevitably will spark heated debates about appropriate limits to fundamental freedoms and equality rights. In Canada, these will revolve around the Charter. This raises a question: Will the Charter emerge from these debates as the same kind of rallying point for Canadians that it became during its first two decades?

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