



SAME-SEX MARRIAGE

An LGBTory Canada Policy Paper

Abstract

The Conservative Party of Canada's Marriage Policy does not support same-sex marriage. This position is outdated, unpopular, and a political liability. It should be changed, and for reasons that are consistent with conservative principles.

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Introduction

In 2002 and 2003, court decisions in Ontario, Quebec, and British Columbia found that Canada's marriage law, by restricting civil marriage to opposite-sex couples, was unconstitutional because it violated the equality clause of the Canadian Charter of Rights and Freedoms. Following an appeal to the Ontario Court of Appeal which upheld the lower court's ruling, and a Supreme Court of Canada reference, the Government of Canada enacted the Civil Marriage Act which extended marriage to same-sex couples in July 2005. Since then, according to 2011 census data, over 21 000 same-sex couples have married in Canada.

Following the 2006 federal election, Prime Minister Harper acted on a campaign promise and introduced a motion in Parliament asking if the issue of same-sex marriage should be re-opened. The motion was defeated in a free vote in the House of Commons by a margin of 175-123. Thirteen Conservative MPs, including six cabinet ministers, voted against the motion. After the vote, PM Harper said, "I don't see reopening this question in the future." Both he and the Government of Canada considered the matter settled.

Nevertheless, the Conservative Party of Canada (CPC) has maintained in its official Policy Declaration a position opposing same-sex marriage and calling for future legislation defining marriage as the union of one man and one woman. This section was added in 2005 when the country was in the midst of a contentious debate on the issue. It was most recently upheld at the 2013 National Convention and approved by the CPC National Council.

Since 2005, the attitude of Canadians to same-sex marriage has changed dramatically. A large majority of Canadians across all regions and all age-groups now supports extending marriage to same-sex couples. The CPC's policy of restricting civil marriage to opposite-sex couples not only threatens to place unfair limits on the established civil rights of same-sex couples, it risks alienating a significant segment of the electorate that would otherwise support the CPC's position on the economy, foreign policy, and the role of government in the lives of citizens.

The CPC's Policy Declaration should be amended to remove the civil marriage provisions, both to send a signal to LGBT Conservatives that they are welcome in the party and to ensure that the CPC has broad appeal to right-of-centre voters. Nevertheless, the CPC should continue to support policies that protect the rights of religious institutions and groups to conduct religious marriage ceremonies and to use their facilities as they see fit is protected.

Same-sex Marriage in Canada – Historical Background

Prior to several landmark court rulings on the subject beginning in 1999, same-sex marriages were not recognized in Canadian law. The legal definition of marriage, based on British Common Law tradition, was “the lawful union of one man and one woman to the exclusion of all others” (Makarenko).

In 1999, the Supreme Court of Canada ruled in *M. v. H.* that it was unconstitutional to exclude same-sex common-law spouses from the legal rights and benefits accorded to opposite-sex couples as outlined in section 29 of the Ontario Family Law Act. The Court ruled that the equality rights of the couple involved in the case as delineated in section 15(1) of the Canadian Charter of Rights and Freedoms had been violated, and that such an infringement was not justified under section 1 of the Charter which permits only “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” However, the Court’s ruling applied only to common-law spouses and did not go so far as to change the legal definition of marriage in Canada (*M. v. H.*).

In 2001, the Rev. Brent Hawkes officiated at two same-sex marriage ceremonies in his Toronto church, using his legal authority as a clergyman to perform the weddings. The local registrar refused to accept the couples’ marriage records and a lawsuit was launched asking the courts to decide if the marriages were legal. In 2002, the Ontario Superior Court ruled in *Halpern v. Canada* that restricting marriage to opposite-sex couples was discriminatory and violated the Charter rights of same-sex couples. Courts in Quebec in the case of *Hendricks v. Quebec 2002*, and British Columbia in the case of *Barbeau v. British Columbia 2003*, reached similar conclusions. The courts stayed the rulings for two years to give the federal government an opportunity to reach a legislative solution (Wikipedia).

On June 10 2003 the Ontario Court of Appeal issued a ruling on an appeal to *Halpern v. Canada*, agreeing with the lower court ruling that restrictions on same-sex marriage were unconstitutional. The court ruled that the 2001 marriages were legal and did not issue a stay on the ruling. Consequently, same-sex marriages became legal in Ontario immediately (Wikipedia).

Following these three provincial court rulings, courts in several other provinces and territories issued decisions on similar cases and also ruled that the legal restriction of marriage to opposite-sex couples was unconstitutional. This happened in Yukon (July 2004), Nova Scotia (August 2004), Manitoba (September 2004), Saskatchewan (November 2004), Newfoundland & Labrador (November 2004), and New Brunswick (June 2005) (Wikipedia).

Prime Minister Chrétien announced soon after the Ontario decision that the Government of Canada would not appeal the case to the Supreme Court of Canada, but would instead prepare legislation extending civil marriage to same-sex couples. The government’s subsequent bill stated that marriage, for civil purposes, would be the “lawful union of two persons to the exclusion of all others” and contained guarantees that the new law would not interfere with the freedom of religious groups to refuse to perform same-sex marriages. The act also contained a provision that asserts that the

legislation could not be over-ridden by use of the “notwithstanding clause” of the Charter of Rights and Freedoms. The government referred the new Civil Marriage Act to the Supreme Court of Canada for a reference on three crucial legal matters: whether the federal government had the authority to change the definition of marriage; whether the Civil Marriage Act met the requirements of the Charter of Rights and Freedoms; and if the act’s protections for religious organizations were constitutional (Law Connection).

While the government was waiting for the Supreme Court reference, the Canadian Alliance Party introduced a motion in the House of Commons in September 2003 re-affirming the traditional definition of marriage as the union of one man and one woman. Unlike a similar vote held in 1999 which passed with overwhelming support from all major political parties, this motion was narrowly defeated by a vote of 137 – 132 (Makarenko).

On December 9, 2004, the Supreme Court of Canada ruled that the proposed Civil Marriage Act was constitutional. It issued a response to the main issues on which the government had sought clarification:

1. The Federal Government did have the exclusive constitutional power to legislate on the definition of marriage, but did not have exclusive power to legislate on the freedom of religious groups to refuse to perform marriages that violated their religious beliefs.
2. The proposed Civil Marriage Act was consistent with the Charter of Rights and Freedoms.
3. The freedom of religion guaranteed by section 2(a) of the Charter protected the right of religious officials to refuse to perform same-sex marriages that were in violation of their religious beliefs.

The Supreme Court declined to answer a fourth question that had been put to it; was the existing opposite-sex requirement for civil marriage consistent with the Charter of Rights and Freedoms? In the court's opinion, the question was moot in light of lower court rulings and the government's intention to legislate on the matter (McLachlin et al.).

Following the Supreme Court reference, the Chrétien government introduced the Civil Marriage bill in the House of Commons in February 2005. A failure of the bill to pass would have meant the maintenance of the status quo, but given the previous lower court rulings on the issue and the findings of the Supreme Court reference, the only way to continue to restrict marriage to opposite-sex couples and withstand further court challenges would have been for the government to use the controversial “notwithstanding clause” of the Charter or to attempt to amend the Constitution. Both options were politically difficult and unlikely to succeed. The bill passed votes in the House of Commons and the Senate and became law when it received Royal Assent on July 20 2005 (Wikipedia).

Following their win in the federal election of January 2006, the minority Conservative government of Prime Minister Stephen Harper announced its intention to fulfill a campaign promise to hold a free vote in the House of Commons on a motion to re-open the debate on same-sex marriage. The motion

asked the government to "introduce legislation to restore the traditional definition of marriage without affecting civil unions and while respecting existing same-sex marriages" (CBC "MPs set to vote").

The motion was introduced in the House on December 6 2006 and was defeated on December 7 by a vote of 175 to 123. Both the Liberals and the Conservatives allowed their caucuses to vote freely on the motion. Twelve Conservative MPs, including six cabinet ministers, voted against it; thirteen Liberals supported it. Following the vote, Prime Minister Harper said, "We made a promise to have a free vote on this issue; we kept that promise, and obviously the vote was decisive and obviously we'll accept the democratic result of the people's representatives. I don't see reopening this question in the future" (CBC "MPs defeat bid"). The 2006 vote in Parliament was the last time the issue of same-sex marriage was raised by a legislative body in Canada.

Same-sex Marriage and Canadian Public Opinion

Public opinion regarding same-sex marriage has changed considerably since the issue first appeared on the political radar. However, since polling was first done on the subject, a plurality or an outright majority of Canadians have consistently supported the right of same-sex couples to marry.

In 1996, Canadians were almost evenly split on the issue. A poll done by Angus Reid/Southam News in June of that year revealed that 49% of those polled were in favour of same-sex marriage, while 47% were opposed (Robinson).

Almost ten years later, a poll done by Forum Research in June 2015 indicated that support for same-sex marriage among Canadians had increased to 70%. Only 20% of those surveyed expressed disapproval, while 8% didn't know/had no opinion. The poll, a telephone survey of 1221 randomly selected Canadians 18 years of age or older, is considered accurate to +/- 3%, 19 times out of 20. An analysis of the 2015 Forum Poll broken down by demographic groups is shown in Table 1:

Age / Gender								
%	Total	18-34	35-44	45-54	55-64	65+	Male	Female
Sample	1221	241	178	204	283	315	685	536
Approve	70	75	78	66	66	59	67	72
Disapprove	22	17	15	27	25	30	25	19
Don't know	8	8	7	8	9	11	8	9

Region									
%	Total	Atl	Que	ON	Man/Sask	AB	BC	English	French
Sample	1221	106	301	352	114	165	183	935	286
Approve	70	73	78	69	63	62	63	67	77
Disapprove	22	18	14	24	25	33	25	24	15
Don't know	8	9	8	7	12	6	12	9	8

Federal Vote Preference							
%	Total	Conservative	Liberal	NDP	Green	Bloc	Other Parties
Sample	1221	315	317	374	75	65	31
Approve	70	49	72	83	77	84	45
Disapprove	22	41	22	10	14	5	36
Don't know	8	10	6	7	9	10	18

Table 1: Support for Same-sex Marriage in Canada, 2015 (Forum Research)

The Forum poll shows that a significant majority of Canadians across all regions and age groups approve of same-sex marriage. Only in the category of Federal Vote Preference: Conservative does support drop below 50%, but the 49% of potential Conservative voters who indicated their approval represents a plurality in that category, compared to 41% who disapprove. The highest levels of support come from Canadians ages 18-34 (75%) and ages 35-44 (78%).

Same-sex couples in Canada – statistics

The Federal Government of Canada has been collecting data on same-sex couples since 2001. In a 2015 summary of statistical data on the subject, Statistics Canada provided a snapshot of these relationships.

Data was collected from the 2011 census in the following categories:

- number of same-sex couple families: 64,575
- number of married same-sex couples: 21,015
- number of common-law same-sex couples: 43,560
- proportion of married couples who were same-sex: 0.3%
- proportion of all couples who were same-sex: 0.8%
- number of children 24 and under living with same-sex parents: 9,600

In the government's 2014 *Canadian Community Health Survey*, 1.7% of Canadians ages 18 to 59 reported that they consider themselves to be homosexual (gay or lesbian), while 1.3% considered themselves to be bisexual (Statistics Canada).

Opposition to same-sex marriage

Opposition in Canada to same-sex marriage comes chiefly from religious groups and individuals whose religious beliefs lead them to support only a traditional definition of marriage. Typically, these beliefs are based on biblical scripture that prohibits homosexuality (Campaign Life - Church).

Opposition also comes from social-conservatives who feel that same-sex marriage undermines the traditional family, which they argue is the foundation of Western Civilization. Tampering with this institution brings about unforeseen social problems that are best dealt with in traditional families. It also removes any legal basis for the state to prohibit other non-traditional forms of marriage that are harmful, such as polygamy (Campaign Life – Marriage).

Conservative arguments for same-sex marriage

The American writer Jonathan Rauch has identified four main functions of the institution of marriage:

- creating and raising children
- settling and stabilizing young people, especially young men
- pooling of resources
- providing care and support for people in difficulty, especially in sickness and old age

All of these strongly reflect values that most conservatives hold to be important, and all apply to same-sex couples.

Although they are not, by themselves, able to have children, same-sex couples are raising thousands of Canadian children, many of whom are the biological offspring of one member of the couple. Evidence suggests that being raised by a same-sex couple has no negative effects on a child; a 2016 study reported that these children had no significant difference in outcomes compared to a similar population of children raised by opposite-sex couples (Bos et al.). Surely these children should be afforded the same benefits and protections that come from being raised by a married couple that children of opposite-sex couples have.

The other functions of marriage also apply to same-sex marriages and should be agreeable to conservatives, in that they encourage and protect beneficial private arrangements between individuals with regard to such things as finances, estates, insurance, housing, health care, and pensions. This ultimately reduces a married couple's dependence on the state, which is a goal that all conservatives share.

Rauch also suggests that same-sex marriage, rather than weakening traditional marriage, strengthens it by creating the societal expectation that all couples should aspire to be married and to forgo less-stable arrangements like cohabitation and common-law marriage (Rauch, 11-28).

Libertarian conservatives believe that marriage is a voluntary contract between two individuals and resist attempts by the state to regulate and control it through legislation and licencing. However, given that the government does regulate civil marriage, libertarians believe that marriage licences should be granted on a non-discriminatory basis, and that same-sex couples who wish to voluntarily enter into a marriage contract should be permitted to do so. Above all else, individuals should be treated equally under the law unless there is a compelling reason to do otherwise (Boaz, 242).

Same-sex marriage policy and the Conservative Party of Canada

The conservative movement in Canada has historically been a sometimes-uneasy alliance of social conservatives, fiscal conservatives, and libertarians. Policy decisions that appeal to one of these groups often alienate another.

The party's core beliefs, which are shared by most conservatives regardless of which strain of conservatism they support, are stated in the "Founding Principles" section of the Policy Declaration (2013). This section declares that the Conservative Party will be guided in its constitutional framework and its policy basis by a number of core beliefs, including:

- A balance between fiscal accountability, progressive social policy and individual rights and responsibilities
- Building a national coalition of people who share these beliefs and who reflect the regional, cultural and socio-economic diversity of Canada
- Developing this coalition, embracing our differences and respecting our traditions, yet honouring a concept of Canada as the greater sum of strong parts
- A belief in the equality of all Canadians
- A belief in the freedom of the individual, including freedom of speech, worship and assembly
- A belief that the best guarantors of the prosperity and well-being of the people of Canada are: the freedom of individual Canadians to pursue their enlightened and legitimate self-interest within a competitive economy; the freedom of individual Canadians to enjoy the fruits of their labour to the greatest possible extent; and the right to own property
- A belief that it is the responsibility of individuals to provide for themselves, their families and their dependents, while recognizing that government must respond to those who require assistance and compassion

(CPC Policy, preamble)

Further on, under the section "Democratic Reform", the CPC states its support for free votes in the House of Commons with the following language:

On issues of moral conscience, such as abortion, the definition of marriage, and euthanasia, the Conservative Party acknowledges the diversity of deeply-held personal convictions among individual party members and the right of Members of Parliament to adopt positions in consultation with their constituents and to vote freely (CPC Policy, 3).

These principles and policies, on which there is broad agreement among party members, are in contrast to the CPC's official policy on same-sex marriage, found in section 70 of the Policy Declaration (CPC Policy, 28):

- We believe that Parliament, through a free vote, and not the courts should determine the definition of marriage.
- We support legislation defining marriage as the union of one man and one woman.

The section on free votes in Parliament regarding same-sex marriage is largely moot today. Parliament has voted on the issue three times since 1999: in 2003, 2005 and 2006. In each case Parliament voted to recognize the validity of same-sex marriage in Canada (Wikipedia).

The policy on legislation prohibiting same-sex marriage is more problematic for the CPC. It stands in contradiction to the stated Founding Principles of the party which purport to champion progressive

social policy, individual rights and freedoms, diversity, equality, and personal responsibility by advocating action by the state to deny established and constitutional civil marriage rights to a minority of citizens and to impose a single model of marriage on all Canadians despite widespread and deeply-felt disagreement.

The marriage policy also contradicts the party's stance on free votes by MPs in the House of Commons on matters of "moral conscience". On the one hand the Policy Declaration supports the right of MPs to vote according to their conscientious beliefs and in consultation with their constituents, but on the other hand states unequivocally that the CPC supports legislation denying marriage to same-sex couples. There is no room in the CPC's marriage policy for MPs who support same-sex marriage to do so within the framework of the party's official policy.

On a purely practical level, the CPC's Policy Declaration takes a stance that is difficult to defend to a large majority of Canadians who support same-sex marriage. Although the government of Prime Minister Harper made no attempt to legislate changes to marriage law after 2006, the CPC's marriage policy is frequently held up as evidence that the party has a "secret agenda" and will continually attempt to open up policy areas that are considered settled in Canada. In 2013, a journalist wrote in *Maclean's* what many critics of the CPC believe:

Stephen Harper might still believe that gay people are not entitled to the same rights as everybody else. That would certainly explain his refusal to say otherwise. If that is not the case, he should deny it. If it is, he should look up and wonder why, after a decade, the sky has yet to fall (Goldenberg).

The CPC marriage policy also alienates libertarian conservatives in the party who resent the intrusion of the state into the private lives of its citizens. Aside from the religious importance of marriage as performed by religious organizations, marriage in Canada is legally a secular institution. Marriage licences are issued by the state not the church, irrespective of the married couple's religious beliefs or lack of them. Some 21 000 same-sex couples have been married in Canada since 2005; libertarians reject the use of state power to intrude on the private affairs of these people and believe that state services should be delivered to everyone without discrimination. The CPC's opposition to same-sex marriage sends a message to libertarians that, despite its stated principles, the CPC does not intend to treat same-sex couples as having the same civil rights as opposite-sex couples, despite having exercised those rights legally for over ten years.

The best solution to the conflict within the party over the issue of same-sex marriage is for the CPC to take a neutral stance on marriage. Section 70 of the Policy Declaration should be amended to remove the policy supporting legislation defining marriage as the union of one man and one woman. This language should not be replaced with any qualifying statements about marriage at all.

This does not necessarily imply support for same-sex marriage. By deleting all reference to the definition of marriage and remaining officially neutral on the issue, there is room in the CPC for both

supporters and opponents of same-sex marriage. Both party members and Members of Parliament would be free to publicly express their opinions on the issue without fear of taking a stance in opposition to official party policy. If a future CPC government decided it was in the public interest to change marriage law in Canada it would be Parliament's prerogative to do so, although it is difficult to foresee a situation where that would be acceptable to the public.

Legitimate concerns that religious institutions have about being forced to perform same-sex marriage ceremonies are adequately addressed by existing language in the 2005 Civil Marriage Act. This legislation states clearly that

nothing in this Act affects the guarantee of freedom of conscience and religion and, in particular, the freedom of members of religious groups to hold and declare their religious beliefs and the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs (Civil Marriage Act).

This principle was affirmed by the Supreme Court of Canada in 2005 (McLachlan et al.) and is explicitly stated in the CPC's Policy Declaration sections 70 and 79 (CPC Policy, 28, 31). This language should remain in the CPC's Policy Declaration; most party members, both social conservatives and libertarians, support the right of private religious institutions to refuse to perform ceremonies that contravene their sincerely-held religious beliefs.

Concerns that social conservatives have about same-sex marriage being a precedent that opens the door to alternate and harmful forms of marriage like polygamy are largely groundless. The Civil Marriage Act, which has been upheld by the Supreme Court as being in compliance with the Charter of Rights and Freedoms, clearly states that marriage is "the lawful union of two persons to the exclusion of all others" (Civil Marriage Act). In addition, section 293 of the Criminal Code of Canada clearly outlaws polygamy:

Every one who

(a) practises or enters into or in any manner agrees or consents to practise or enter into

(i) any form of polygamy, or

(ii) any kind of conjugal union with more than one person at the same time, whether or not it is by law recognized as a binding form of marriage, or

(b) celebrates, assists or is a party to a rite, ceremony, contract or consent that purports to sanction a relationship mentioned in subparagraph (a)(i) or (ii),

is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years ("Polygamy", On Canadian Law).

Canada's polygamy law has been upheld in the courts, most recently by the British Columbia Supreme Court in a 2011 reference case, although it has not yet been tested in the Supreme Court of Canada (CBC Polygamy). The lack of criminal prosecutions of polygamists in Canada is due more to a lack of will by provincial governments to bring charges rather than a lack of legal tools to prosecute.

Furthermore, a clear case can be made that polygamous marriages cause harm to some of the people involved, particularly to women and minors, and that the state has an obligation to intervene to protect these people under both domestic and international law (Polygyny). It is difficult to make that case with same-sex marriages.

Conclusion

The issue of same-sex marriage is a divisive one for the Conservative Party. Many social conservatives object to same-sex marriage for religious reasons; at the same time, libertarian and LGBT conservatives object to a policy that advocates legislation to roll back civil marriage rights that have been extended legally to same-sex couples since 2005.

The party's official position opposing same-sex marriage puts it in opposition to the opinions of a large majority of Canadians and is used by political opponents who accuse the party of having a "hidden agenda" that would open up policy areas that most Canadians considered settled. It negatively affects the perceptions of the party that are held by centrist voters who would otherwise be attracted to the CPC's position on other policy areas, and it sends a message to LGBT conservatives that they are not welcomed or valued by the party.

The CPC should adopt a neutral policy on same-sex marriage and remove references to the definition of marriage from its Policy Declaration. This would allow party members and parliamentarians to express differing opinions on this personal moral issue without contravening official party policy. Language protecting the rights of religious organizations to refuse to perform same-sex marriage ceremonies is already included in existing marriage legislation and has been upheld by the courts. It should continue to be included in the Policy Declaration.

By being officially agnostic on the issue of same-sex marriage, the CPC's Policy Declaration can be acceptable to all party members and MPs with strongly-held personal or religious beliefs while welcoming LGBT conservatives into the party and presenting a platform that is supported by a large majority of Canadians.

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