

Revisiting same-sex marriage

POLLING PARLIAMENT | How a few opponents of C-38 are likely to defeat the bid to reopen debate

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A handful of Liberal and Bloc Québécois MPs who are against same-sex marriage are likely to be the reason the Conservative government will fail in its attempt to reopen debate on same-sex marriage.

The *Toronto Star* surveyed all 306 MPs by email and follow-up telephone calls on how they felt about Prime Minister Stephen Harper's intention to reconsider the legislation.

Of the 246 MPs who responded, 141 said they would vote against reopening the debate and 58 would vote for the motion.

Forty-seven MPs declined to respond to the survey question. Of these, four voted for Bill C-38, the legislation that brought in same-sex marriage last year.

Sixty MPs did not respond to the survey. Of these, 10 voted in 2005 for C-38.

The total number of MPs who told the *Star* they would vote against the motion or who are in favour of same-sex marriage is 155, a majority in the current 306-member Parliament.

Other organizations say the majority is actually greater than that.

"Because you don't know who's going to be in the House at the time of the vote, we're more interested in spreads, and we have a 35-vote spread," says Laurie Arron, national co-ordinator of Canadians for Equal Marriage, a pro-gay marriage group. "For us to lose this vote is inconceivable at this point."

He says from personal contacts with MPs that 151 have confirmed voting against reopening and 15 are "leaning" that way, while 116 will vote to reopen.

But that doesn't mean the divisive issue will disappear.

Social conservatives and sympathetic politicians say they will continue to fight same-sex marriage as long as there is a legal avenue to pursue. And in spite of the claims by the pro-gay marriage lobby to the contrary, legal experts say there probably is such an avenue.

One of Harper's campaign promises before forming a minority government in January was that he would seek to revisit the same-sex marriage issue.

That prompted criticism from both pro-gay advocacy groups and legal scholars who claimed it would be a futile effort since the Prime Minister also pledged not to bring down the heavy hammer of the Constitution's notwithstanding clause, which allows the government to enact a law even though it might



TOM HANSON/CP

Socially conservative religious leaders stand up for traditional "one man-one woman" marriage at a Thursday press conference in Ottawa.

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be contrary to the Charter of Rights and Freedoms.

That apparent futility underpins the motivations of MPs who voted against Bill C-38 but oppose re-examining the law.

Attempting to reopen debate "is a sham, it's intellectually dishonest," says Bryon Wilfert, Liberal member for Richmond Hill, who voted against same-sex marriage last year.

"It's disingenuous of this Prime Minister to suggest a free vote that will lead to an overturning of the legislation, especially considering the fact that the Supreme Court has ruled on this, and it's pretty much been ruled on in every province and territory," Wilfert says, his indignation palpable on the phone from Ottawa.

Wilfert is adamantly opposed to evoking the notwithstanding clause, which he says is the only way the legislation could be overturned.

The clause would be necessary, he and others argue, because the Ontario Court of Appeal, along with courts in seven other provinces and one territory, have already ruled that the traditional "one man-one woman" definition of marriage is unconstitutional since it violates the equality provision of the Charter.

But Harper promised during the election that his government would not use it.

"No vote in the House of Commons will lead to a change," Wilfert insists, "so this is an attempt to placate traditional voters and say, 'It didn't pass the House.'"

Wilfert was one of 32 Liberals who voted against C-38, which passed narrowly by a margin of 158 to 133. The vast majority of Liberals voted in favour, as did those in the Bloc and the New Democratic Party.

While most Conservatives voted against the bill, Tory MPs Gerald Keddy, Jim Prentice and James Moore, voted in favour and told the *Star* they would vote against reopening debate.

The pressure on Harper to hold such a vote is intensifying. On Thursday, a coalition of religious leaders told the government to put forth the motion and give same-sex marriage a "sober second thought." Bruce Clemenger, president of the Evangelical Fellowship of Canada, called for a renewed debate "on the definition and nature of marriage."

However, Wilfert thinks the public has moved on.

"The world hasn't collapsed," he says. "It's the law of the land, and I think we waste far too much time consumed with an issue the courts have already ruled on when we should be talking about more important issues, such as the environment."

Other MPs who opposed same-sex marriage and share Wilfert's aversion to reopening debate include fellow Liberals Raymond Simard, Brenda Chamberlain, Roger Cuzner, Bill Matthews and Bernard Patry, as well as Bloc Québécois MPs Robert Bouchard and Roger Gaudet.

Simard, a Liberal from Manitoba, says he hasn't changed his mind on gay marriage, but "it was a terribly tough debate, heart wrenching. I can't see us bringing it back. I think several of our members feel the same way."

Chamberlain, Liberal MP for Guelph, says a motion to reopen the debate is a red herring. "It's fundamentally dishonest. If Mr. Harper wants to repeal the marriages that have already gone through, then put that on the table. If he wants to change the law, put that on the table."

Some MPs who remain undecided also say the Conservatives are playing politics.

"If it meant to rescind the legislation, I'd vote to support it," says Scarborough Centre Liberal MP John

Cannis, who voted against C-38. "But this initiative is nothing but a tease. It's political posturing."

Among the opposition parties, cynicism over Harper's motivations runs rampant. Many believe the PM will hold the vote, then blame the Liberals for its failure. At the same time, he'll be able to maintain his credibility with his social-conservative supporters. Some are convinced Harper knows the motion will fail, and is even hoping for such a scenario to avoid the legal quagmire that would result from such a vote's success.

"We'll defeat the motion and then he'll go back to them saying, 'We tried,'" Scarborough-Agincourt Liberal MP Jim Karygiannis says. "It's the coward's way out."

Despite Karygiannis's misgivings over the motivations of the Harper government, he says he will vote in the spirit he always has: against same-sex marriage.

In the spring, social conservative groups began to re-think Harper's strategy. They questioned whether it would not be better to wait until the next election, and a possible Conservative majority in Parliament, to revisit the issue, when failure would be impossible.

According to evangelical pastor Charles McVety, who heads the Canada Family Action Coalition, Harper rejected this strategy and vowed to move ahead with a vote in the House.

So, groups like his decided to redouble their lobbying efforts, says McVety, also president of Toronto-based Canada Christian College.

Publicly, groups like McVety's have toned down their calls to rescind the legislation and are now asking for same-sex marriage and its effects on society to first be studied comprehensively.

"We had about two weeks or thereabouts of what can only be called sham hearings last year on what is arguably the most important piece of social policy legislation we've passed in this country in a generation," says Joseph Ben-Ami, executive director of the Institute for Canadian Values, a faith-based policy think-tank.

"We also think it's good government practice to review policy after a reasonable amount of time to ensure it's not having unintended consequences."

Opponents of gay marriage think it's possible to turn back the clock and change the definition of marriage to exclude same-sex couples, and that there is a legal route to get there.

Before the Liberals brought in C-38, they asked the Supreme Court to answer a few questions.

One was whether extending to same-sex couples the right to marry was consistent with the Charter of Rights. Another was whether the traditional definition of marriage was consistent with the charter.

The court answered the first question in the affirmative. But it declined to answer the second.

Same-sex opponents say it's the second question that could leave them room to manoeuvre.

"They didn't say the heterosexual definition was unconstitutional," explains Janet Epp Buckingham, director of law and public policy for the Evangelical Fellowship of Canada.

"It is constitutionally permissible to change the definition, but the court didn't rule as to whether that was a requirement. It said you can do it, but you don't *have* to do it."

Opposition parties and pro-gay advocates say the only hope to change the law is by using the notwithstanding clause.

But it might be possible, Epp Buckingham says, to revert to the "one man-one woman" definition of marriage so long as gay and lesbian partnerships are legally recognized with civil-union status or some

other designation.

Allan Hutchinson, professor at Osgoode Hall Law School at York University, says that giving gays and lesbians "a second option doesn't make up for the fact that you still left them out" of marriage.

"So, I think the courts might well strike that down."

But, he says, "nobody can be 100 per cent sure." In this way, a legal challenge to same-sex marriage is possible, if not winnable.

"I think they have some room," Hutchinson says. "It is absolutely true the Supreme Court has not definitively said, 'You can't do that.' They've clearly given signals they're not keen on that, but in that sense, the door remains slightly ajar."

If the notwithstanding clause ends up not being necessary, lawyers who've fought gay marriage battles say new court cases are inevitable.

"And it wouldn't be a six- or eight-year court case because there is a concept in our law called *res judicata*, meaning the issue has been decided," says Martha McCarthy, a prominent Toronto family lawyer who has been involved in same-sex cases since 1991.

"You can't litigate the same things you've lost."

Of course, the government could get out of the marriage business altogether and go with civil unions for everyone. But there is no agreement on this idea, either.

As long as these possibilities exist, the issue will not go away.

"Some people think that if this Parliament decides not to open and debate and study marriage that it will never be studied in the future. It's not true.

"There's no compelling reason why a future Parliament would be bound by a vote in this Parliament," says Canada Family Action Coalition's McVety.

Many Canadians thought that when Ottawa finally adopted same-sex marriage, that would be the end of the debate.

How wrong they were.



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