

RC school funding ruled constitutional

By Mark Kennedy
Citizen staff writer

TORONTO — In an historic split decision, the Ontario Court of Appeal has ruled that provincial legislation extending full public funding to Catholic high schools is constitutional.

The 3-2 ruling released Tuesday gives the Liberal government the green light to proceed with its bill giving public money to separate school boards for Grades 11, 12 and 13.

The court's decision is likely to be appealed to the Supreme Court of Canada — keeping the legal battle alive for at least another year — but opponents of the legislation said Tuesday they won't decide on their next move until they've studied the judgment.

Education Minister Sean Conway said he hopes to have the legislation — which has been on hold pending the decision — enacted before the next school year begins in September.

"I'm pleased that the decision is a positive one," Conway told a press conference Tuesday.

"It's good news for the government."

Despite speculation the court might find the principle of full funding constitutional but reject certain aspects of Bill 30, the government received carte blanche approval.

The three-year, \$150-million full-funding plan — which took effect on an interim basis last fall

with about \$26 million in funding for Grade 11 — caused a furor in Ontario that contributed to the defeat last year of the 42-year-old Conservative government.

In a stunning policy reversal, former premier William Davis announced in June 1984 a plan to fully fund Catholic schools, which had been supported by the province only to the end of Grade 10.

The three justices who wrote the 29-page majority decision ruled the Charter of Rights and Freedoms cannot be used — and was not intended — to override educational rights granted to Ontario's Catholics in the British North America Act of 1867.

The BNA Act, which created Canada and is now the basis for the Constitution, was made possible only because of the educational rights it gave Ontario Catholics and Quebec Protestants, the court said.

Those two provinces entered Confederation on condition that the educational rights of their religious minorities were protected.

"This was the cornerstone of Confederation," the justices wrote.

They admitted, however, that "these educational rights, granted specifically to the Protestants in Quebec and the Roman Catholics in Ontario, make it impossible to treat all Canadians equally."

Canada was founded on the rec-

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ognition of "special or unequal educational rights" for specific religious groups that existed at the time, the court ruled.

Despite the influx of other racial and religious minorities in more recent years, the incorporation of the Charter in 1982 "does not change the original Confederation bargain."

Only a specific constitutional amendment could be used to accomplish that, they said.

But the two dissenting justices — Chief Justice William Howland and Justice Sydney Robins — said the Charter can be used to overturn Bill 30.

They said the bill is inconsistent with Section 15 of the Charter, which gives every individual the right to equal benefit of the law without discrimination.

The dissenting justices said that prior to the Charter coming into force, there is no doubt that Bill 30 would have been constitutional.

But they argued the Charter is now the supreme law and "establishes a new relationship between the individual and the state."

During his appearance before the court four months ago, Scott argued Bill 30 is constitutional because separate schools possessed the same rights as public schools at the time of Confederation.

Those rights have been curtailed since then, and Bill 30 merely restores equality, Scott argued.

The three justices who formed the majority — Walter Tarnopolsky, Peter Cory and Thomas Zuber — agreed.

Section 93 of the BNA Act gave provinces the right to make laws regarding education and there

was nothing in that section that would have prevented provincial legislatures from providing full funding for Catholic high schools, said the court.

Quebec — the other main partner in Confederation — has since given Protestants full school funding, noted the justices.

The justices noted that Section 29 of the Charter says nothing in the Charter can take away "any rights or privileges" extended to separate schools already guaranteed "by or under the Constitution of Canada".

After upholding the constitutionality of full funding, the justices made no comments on crucial details in the bill such as access for non-Catholic students and job guarantees for public-school teachers who transfer to the separate system.

The justices left it up to later courts to decide what is acceptable or unacceptable in how a Catholic school treats its teachers or students.

A legislative committee held several months of public hearings last summer and fall on Bill 30.

It adjourned before Christmas to wait for the court decision.

Conway said he hopes to have the committee resume its hearings this spring — possibly in early April — for clause-by-clause analysis.

He said he wants the bill in force by September, which means the legislature would likely pass it into law by the time of its traditional summer recess at the end of June.

It's not yet clear how Tuesday's ruling will affect a divisional court case regarding the legality of the government's method of funding Catholic Grade 11 last fall by cabinet order.

The government forwarded interim funds to separate boards by order-in-council because it could not grant the money through legislative authority until Bill 30 is passed.