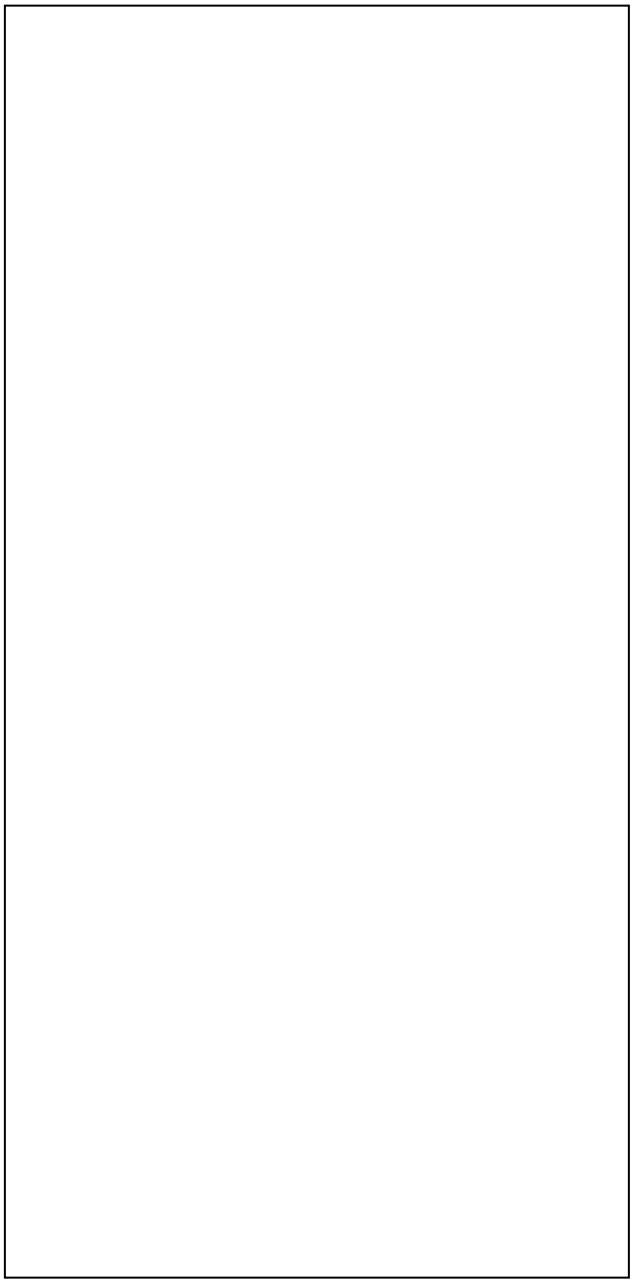

Quebec.[2] Third and last remark: the thesis developed here could have legal consequences; in the Reference Case on parental leaves currently pending at the Supreme Court of Canada, the government of Quebec partly based its written presentation on this thesis. Further comments will have to await the decision of the Court.

Revisionist historiography has fostered a reconsideration of the centrality of George-Etienne Cartier, George Brown and Oliver Mowat, alongside John A. Macdonald, in the business of founding Canada as a federal Dominion under the British Crown between 1864 and 1867. Led by Brown and later by

has argued, Scott neglected one dimension of the provision: no standardization would ever occur without the explicit consent of the provincial legislature involved in the operation.[8] For my purposes here, it is interesting to point out what Scott, despite his unimpeachable centralist credentials, had to say about the relationship of Quebec with regards to this provision. On numerous occasions in his famous piece on Section 94, Scott reiterated that it did not apply to Quebec.[9] In the field of property and civil rights, the province of Quebec could not relinquish its legislative powers. Now this has to be seen as a clear legal manifestation of asymmetrical federalism. Recent revisionist historiography such as the work accomplished by Ajzenstat, Romney, Gentles and Gairdner in Canada's Founding Debates unmistakably support this dimension of Scott's interpretation. On the matter of property and civil rights, our Founders thought that Quebec, with its civil law tradition, could never be rendered uniform with the other provinces, not even if it gave its own consent to such standardization! The following excerpts of speeches pronounced by M.C. Cameron (Canada West) and Christopher Dunkin (Canada East) in the United Canadian Parliament in 1865 lend support to such a reading of this dimension of our constitutional arrangement :

> Such being the guarded terms of the resolution, why is it not made applicable to Lower Canada as well as to the other provinces? I can easily understand the feeling of the French people and can admire it –that they do not want to have anything forced upon them whether they will or not. But they will not allow you to contemplate even the possibility of any change taking place for the general weal, and with their own consent, in their laws… I do not understand.[10]

> The other provinces may have their laws made uniform, but an exception in this respect is made for Lower Canada, and as if to make it apparent that Lower Canada is never to be like the rest of the Confederation, it is carefully provided that the general parliament may make uniform the laws of the other provinces only –that is to say, provided those provinces consent to it, but by inference it cannot extend this uniformity to Lower Canada, not even if she should wish it… They may become uniform among themselves, but Lower Canada, even though her people were to wish it, must not be uniform with them… Thus, in one way and another, Lower Canada is to be placed on a separate and distinct footing from the other provinces, so that her interests and institutions may not be meddled with.[11]

There were many aspects to Confederation, and many sides to the political career of Cartier; I wish to over-simplify neither of these complex realities here. Obviously, there were many centralizing aspects in the Quebec Resolutions and in the *Constitution Act 1867*; many of them were approved by Cartier. For instance, as the person with the broadest social connections among our Founders, Cartier supported the powers of reservation and disallowance as means to offer safeguards to the English-Catholic and Protestant groups in Quebec.[12] This notwithstanding, Cartier's central achievements were the restoration of the political existence and autonomy of Quebec, with legislative control over local matters and affairs related to communitarian identity such as property and civil rights. Through the well-understood meaning of Section 94, at least for our Founders, at the time of Confederation and of civil law codification, Quebec re-emerged as a self-governing political community with substantial legislative powers and a unique, distinct, asymmetrical constitutional identity in Canadian federalism. We should not be

[8] La Selva, The Moral Foundations of Canadian Federalism, p.56-57.
[9] F.R. Scott, Essays on the Constitution, Toronto : University of Toronto Press, 1977, p.114-118-122.
[10] Ajzenstat, Romney, Gentles and Gairdner, Canada's Founding Debates, p.305-306.
[11] Ibid., p.346
[12] Ibid., p.435.