Hon. Mr. van Roggen: One of the provisions of the BNA Act is that the Governor in Council may instruct the Lieutenant-Governor of a province to withhold his assent on the bill being presented for royal assent. I hope you would not argue that I must wait until the horse has left the barn before I raise the matter.

Hon. Mr. Martin: I wish to understand clearly what the senator is proposing. Is he asking that the government should disallow the measure?

Hon. Mr. van Roggen: Yes.

Hon. Mr. Martin: He is not suggesting what the government should recommend to the Lieutenant-Governor?

Hon. Mr. Asselin: The law is not yet in force.

Hon. Mr. van Roggen: I am advocating today that the federal government, through the medium of the Governor in Council, which is the federal Cabinet, disallow this provincial legislation. Three mechanisms exist which might be used for this. The Lieutenant-Governor can withhold assent, which is uncommon, or he could reserve assent for the Governor General, following which ensues one year's period during which final decision can be made by the federal government. In fact, I was about to read from a resumé which describes how this procedure works. It is as follows:

> Under the powers conferred upon him by Section 90 of the B.N.A. Act, a Lieutenant-Governor may do one of three things with a bill which has passed through all its stages in the legislature and is presented to him for royal assent: he may signify that he assents to the bill in the Queen's name whereupon it becomes an Act of the legislature; he may withhold his assent; or he may reserve the bill so that it may be considered by the Governor General. The first of these three courses is the normal one, and requires no comment. The second is a simple veto; the bill is dead and can be revived only by introducing it again into the legislature, passing it through all its stages, and presenting it again for assent at a subsequent session of the legislature. The third is not a withholding of an assent (that is, there is no veto), but the decision as to whether assent will be given or withheld is passed back to the Governor General, acting on the advice of his ministers is Ottawa.

● (1450)

> In such a case the reserved bill has no force unless and until, within one year from the day it was presented to the Lieutenant-Governor for the royal assent, it receives the assent of the Governor General in Council.
>
> It should be noted that the Governor in Council is not obliged to do anything at all. If no action is taken during the year then the bill has been effectively vetoed.
>
> In addition to this power the Governor in Council may disallow any provincial Act within one year after its receipt at Ottawa.
>
> Some seventy bills have been reserved by Lieutenant-Governors since Confederation, of which thirteen have been assented to by the Governor General.

Of course, the majority of those bills were reserved prior to the turn of the century, but a number of them have been dealt with since then.

I do not wish to take the time of honourable senators with a long and technical legal discussion as to whether or not this power exists. Suffice it to say that at the time of the disallowance of the Alberta legislation of Premier Aberhart, including the Press Gag Law, in 1937, the federal government referred the whole matter to the Supreme Court of Canada by way of reference. I give just one or two excerpts of remarks made by supreme court justices at that time as to the power of the federal government in the BNA Act, and as to whether or not that power exists today. Mr. Justice Kerwin concludes:

> —these words are so clear that comment or elaboration would appear to be superfluous.

In the opinion of Mr. Justice Cannon section 7 of the Statute of Westminster "gives new force, if necessary, to the existing provisions of the British North America Act and preserves them."

It was also recalled that the power of disallowance by the Governor General has been recognized in at least two judgments of the Privy Council.

Is there any restriction on this power? Here again I quote from a former Chief Justice of Canada:

> There is nothing in the British North America Act controlling this discretion; nor is there any other statute having any relevancy to the matter.
>
> The power of reservation is subject to no limitation or restriction, except in so far as his discretion in exercising it may be controlled or regulated by the Instructions of the Governor General—

There is one remaining thing and that is, while reference is made to the "Governor General" it is settled law that it is the Governor General in Council—that is, the Cabinet—that has this power. Mr. Justice Taschereau affirmed that:

> —power of veto is given to the Governor General in Council, not to the Governor General himself.

I should now like to make a few general observations. The first is that in a majority of instances of disallowance to date, the question was as to whether or not a province had exceeded its jurisdiction. That was the simple question at issue, namely, a question of *ultra vires*. On the other hand only a minority of instances of disallowance involved legislation which was within the power of the provinces under section 92 of the BNA Act but which was reserved by the federal government because it was oppressive, against natural justice, or otherwise against public policy. While cases in this category are in the minority, they still do exist. Senator Forsey, who is probably Canada's greatest authority on this subject—with the possible exception of Senator Goldenberg—will correct me if I am wrong in that.

Some say that this power of disallowance should be used by the federal government only when a province has clearly attempted to legislate in an area which is not within its power and that the power should not be used in an area clearly within provincial jurisdiction such as property and civil rights.