whether or not the debt is "commercial", perhaps the courts should make a more detailed examination of the particular transaction in determining this factor.

Notwithstanding that a definite policy approach to the question has yet to be clearly enunciated in the Supreme Court of Canada, this case stands as an indication that Canadian law seems to be moving towards the exclusion of sovereign prerogatives where Crown enterprise assumes a commercial complexion.

Alan D. Reid*

INSURANCE — UNIFORM ACT — CHANGE OF PREFERRED BENEFICIARY — STATUTORY TRUST — CAPACITY — TEST OF INSANITY—TESTAMENTARY OR CONTRACTUAL.

The British Columbia Court of Appeal in the case of *Re Rogers*[1] deals with a question of considerable interest. The point before the court was whether the designation of a preferred beneficiary by the insured could be contested on the ground that the insured lacked capacity to make such a declaration. Although this issue has been raised before,[2] few judges have attempted to describe the nature of the transaction by which a preferred beneficiary is designated and the consequent test of mental capacity required, preferring, rather, to ground their decision on a more general issue: ". . . It comes down to this simply: Was the act mentally and physically really that of the donor?"[3]

Confining comment to the insurance aspect of the case the facts are as follows. In 1958, Rogers took out a policy of insurance on his life naming his parents beneficiaries. By section 141(2)[4] of the British Columbia Insurance Act (this incorporates in substance, as do the Insurance Acts of the other common law provinces, the Uniform Life Insurance Act) the parents became preferred beneficiaries, and by section 147(1)[5] a statutory trust was created in their favour. On July 10, 1961, Rogers was married to the respondent. On October 11, 1961, he revoked the designation of his parents and by declaration named his wife as

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1 *Re Rogers* (1963), 39 D.L.R. (2d) 141.

2 *Book v. Book et al.* (1900), 32 O.R. 206; *Re Baeder and Canadian Order of Chosen Friends* (1916), 36 O.L.R. 30; *Clark v. Loftus*, [1912] 4 D.L.R. 39; *Young v. Toronto General Trust Corp. et al.*, [1939] 4 D.L.R. 766; *Re Isaacs*, [1954] O.R. 942.

3 *Clark v. Loftus*, [1912] 4 D.L.R. 39, *per* Meredith, J.A., at p. 52.

4 R.S.B.C., 1960, c. 197; R.S.N.B., 1952, c. 113, s. 150(2).

5 R.S.N.B., 1952, c. 113, s. 156(1).

beneficiary, as by section 148 of the Act[6] he is permitted to do, his wife being also a member of the preferred class. The parents contested his declaration on two grounds, the first, that the respondent was not validly married to the insured. This aspect of the case is not considered here but the court found that there had been a valid marriage, and hence the nomination had not been made outside the preferred class. Secondly, it was said that the insured did not have mental capacity to change the beneficiary. The real effect of the insurance as between the insured and his parents was to confer on the latter a gift of the policy benefits. Such being the case the transaction should require the equivalent of a testamentary capacity, similar to that set out in *Banks v. Goodfellow*.[7] That the insured did not have such a capacity was suggested by the fact that for some time he had been undergoing psychiatric treatment, believed he was being persecuted by various people and was given to frequent outbursts of irrational behaviour. In addition, it was noted that the insured's death was occasioned by suicide.

The trial judge, Ruttan, J., disposed of the case on the basis "that Rogers understood the nature of the document he was signing on October 12 and the effect such action would have on the disposal of his property".[8] This statement suggests that Mr. Justice Ruttan considered the declaration of a beneficiary analogous to a gift, but subsequently he remarked: "My decision is not altered if I apply to this transaction the rules of testamentary capacity".[9]

The Court of Appeal upheld in result the finding of the lower court. The court was divided, however, on the test of capacity to be applied. In the majority judgment Mr. Justice Wilson, with Mr. Justice Davey concurring, said that the proper test of capacity should be testamentary, the requirements of which are set out in *Banks v. Goodfellow*.[10]

> It is essential to the exercise of such a power that the testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties—that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would have been made.

6 R.S.N.B., 1952, c. 113, s. 157.
7 (1870), L.R. 5 Q.B. 549, at p. 565, *per* Cockburn, C.J.
8 *Re Rogers* (1963), 36 D.L.R. (2d) 661, at p. 671.
9 *Ibid.*
10 (1870), L.R. 5 Q.B. 549, at p. 565, *per* Cockburn, C.J.

Applying this rule to the evidence before him Wilson, J.A., was satisfied that Rogers did have the requisite mental capacity to make the designation.

Mr. Justice Sheppard, on the other hand, considered the declaration simply an alteration of a contract between the insured and the insuring company, its validity resting solely on the insured's capacity to contract, which in turn is governed by the fairly stringent requirements set out in *Imperial Loan Co. v. Stone*[11] "that to invalidate a contract a party must be so insane as to be incapable of understanding what he was doing at the time of the contract and such insanity must be known to the other party".[12] Mr. Justice Sheppard concluded by saying that since there was no evidence that the insured did not understand what he was doing, nor any suggestion that the insurance agent had reason to believe the insured mentally incompetent the declaration must stand.

The practical result of the contractual approach taken by Sheppard, J.A., is that if it is impossible to prove that an insurer or his agent knew or should have known that an insured was mentally incompetent, then, although the insured is clearly insane when he made the declaration designating a new beneficiary, that declaration must stand. Even this limited chance of success would disappear if the insured chose to make a "secret" declaration of beneficiary, which by section 144(1) of the Insurance Act[13] he is permitted to do.

From a logical standpoint, however, the contractual approach has considerable merit. A life insurance policy is, first and foremost, a contract.[14] At common law a beneficiary being a stranger to the contract could acquire no interest in the policy, either at law or in equity simply because the policy moneys were expressed to be payable to him.[15] This has been altered by statute.

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11 [1892] 1 Q.B. 599.

12 *Re Rogers* (1963), 39 D.L.R. (2d) 141, at p. 145.

13 R.S.B.C., 1960, c. 197; R.S.N.B., 1952, c. 113, s. 153(1).

14 *Re Mendelson*, [1940] 2 D.L.R. 382, *per* Baxter, C.J., at p. 387; Odgers, *The Common Law of England*, 2nd ed., vol. II, at p. 922; Laverty, F.J., *The Insurance Law of Canada*, 2nd ed., at p. 10.

15 *Deckert v. The Prudential Insurance Company of America*, [1943] O.R. 448, at p. 449; see also *Cleaver v. Mutual Reserve Fund Life Association*, [1892] 1 Q.B. 147, *per* Lord Esher, M.R., at p. 152; *Gunter v. Williams* (1897), 1 N.B. Eq. R. 400, *per* Barker, J., at p. 403; *Cornwall v. Halifax Banking Co.* (1901-2), 32 S.C.R. 442, *per* Sedgewick, J., at p. 446; *Re Englebach* (1924), 93 L.T. Ch. 616; McVitty, *Commentary on the Life Insurance Laws of Canada*, at p. 141.

Section 144(2)[16] of the Insurance Act allows the beneficiary to sue to enforce his rights under the policy. Section 147(1)[17] which sets up a statutory trust in favour of a preferred beneficiary would, by implication, allow such a beneficiary to enforce the contract in his favour. But argues Mr. Justice Sheppard, "these are mere statutory additions to the policy created by the insuring company and the insured".[18] The wording of section 144(2) seems to support this view for it does not purport to make the beneficiary a party to the insurance contract; nor will it protect him if the insurer is able to set up some act of the insured's in violation of the terms of the policy, as a defence to the beneficiary's claim.

Thus if a beneficiary, being a stranger to the contract, wishes to contest the insured's capacity to alter its terms, which is essentially a matter between the insured and the insurance company, he should be bound by the contractual test of capacity, for his interest, limited by and defined in the contract taken out by the insured, will admit no other approach.

Mr. Justice Wilson approached the question by examining the underlying intention of the Insurance Act. First, he noted that section 147 and 148 stipulate that when a preferred beneficiary is named, a statutory trust is established. Further, by section 148 of the Act the insured may ". . . restrict, limit, extend, or transfer the benefits of the contract to any one or more of the class of preferred beneficiaries to the exclusion of any or all others of the class . . ."[19] From this he concluded that the real effect of the statute is to leave to an insured who has designated a preferred beneficiary only "a special power of appointment limited to a class, the power including the right to revoke previous appointments",[20] and that being so, the question becomes which test of capacity, testamentary or contractual, would be the more appropriate. Examining the reasoning behind each test he states:

> I think the real difference between the two classes of cases is this, that the contractor is required to be capable of appreciating his own interest whereas the testator is required to be capable of appreciating the interests of other persons, those interests consisting of their claims to his bounty.[21]

From this characterization he concludes that since the donee of a power is primarily concerned with the interests of others the proper test of capacity is testamentary.

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16 R.S.B.C., 1960, c. 197; R.S.N.B., 1952, c. 113, s. 153(2).
17 *Ibid.*
18 *Re Rogers* (1963), 39 D.L.R. (2d) 141, at p. 145.
19 R.S.B.C., 1960, c. 197; R.S.N.B., 1952, c. 113, s. 157.
20 *Re Rogers* (1963), 39 D.L.R. (2d) 141, at p. 147.
21 *Ibid.*, at p. 148.

But while it is true that the insured may, when he designates a preferred beneficiary, retain a power analogous to a special power of appointment,[22] this approach disregards the fundamental point that the insured is still a party to the contract, and that the statutory trust which was created by the insured's designation will always be subject to the terms of the contract from which it arose and may be defeated at any time by the neglect of the insured.[23] Thus in a more basic aspect the status of the insured is not merely that of a holder of a power of appointment but that of a party to a contract of insurance in which certain of his rights, among them power to change beneficiaries, have been set out by statute.[24] In addition, Mr. Justice Wilson's characterization of contractual and testamentary interests is open to question, for while it is true that a contractor must be able to appreciate his own interests, the lack of such an understanding will not of itself provide grounds for the avoidance of a contract, for there must be the further fact that the other party was aware of the contractor's mental state or the contract itself must be manifestly unfair.[25] This rule is not designed for the protection of a mentally incompetent contractor, for it contradicts the general requirement that there must be free and full consent to bind persons in contract. Rather, its primary intent is to uphold the sanctity of contract by providing that no man may stultify and disable himself so as to avoid his contract if the other party was not aware of his incapacity.[26] It must be agreed, however, that with the exception of annuities, this approach is hardly amenable to contracts of life insurance which are rarely sought to be upset on the grounds of incapacity, for usually only the designation of a beneficiary is the point in question, and the contestants are not the parties to the contract but those named to receive its benefits. To determine these equities it is important to bear in mind the primary function of life insurance. That function is to allow an individual to make provision for his family upon his death.

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22 *Deckert v. The Prudential Insurance Company of America,* [1943] O.R. 448, *per* Plaxton, J., at p. 454; see also *Doull v. Doelle* (1905), 10 O.L.R. 411, *per* Street, J.; *Re Goatbe* (1922-3), 53 O.L.R. 118, *per* Middleton, J., at p. 123; *Cf. Re Baeder and Canadian Order of Chosen Friends* (1916), 36 O.L.R. 30, *per* Meredith, C.J.C.P., at p. 35.

23 *Youlden v. London Guarantee and Accident Co.* (1913), 28 O.L.R. 161, *per* Hodgins, J., at p. 173.

24 *Re Mendelson,* [1940] 2 D.L.R. 382, *per* Grimmer, J., at p. 389. This case dealt with an ordinary beneficiary but the same reasoning would apply to a preferred beneficiary.

25 *Imperial Loan Co. v. Stone,* [1892] 1 Q.B. 599; Halsbury's *Laws of England,* 2nd ed., vol. 21, p. 280.

26 Halsbury's *Laws of England,* 3rd ed., vol. 29, pp. 406, 407.

It is the protection of this interest that has concerned the framers of insurance legislation ever since 1865 when the legislature of the Province of Canada passed "An Act to Secure to Wives and Children the Benefits of Assurance on the Lives of their Husbands and Parents".[27] By this enactment the insurance was to pass from the insured to his family "free from the claims of any creditor or creditors whomsoever".[28] A similar purpose was behind the statutory trust created by the Insurance Act[29] in favour of a preferred beneficiary. The recently revised[30] Uniform Life Insurance Act also affords this protection, but in a more satisfactory way. The concept of the preferred beneficiary and its attendant trust, which proved to be so troublesome, have been eliminated. In their place are the following sections:

> 148. (1) Where a beneficiary is designated, the insurance money, from the time of the happening of the event upon which the insurance money becomes payable, is not part of the estate of the insured and is not subject to the claims of the creditors of the insured.
>
> (2) While a designation in favour of a spouse, child, grandchild or parent of a person whose life is insured, or any of them, is in effect, the insurance money and the rights and interests of the insured therein and in the contract are exempt from execution or seizure.[31]

For this reason the interest of an insured, although not strictly testamentary[32] should be recognized as being analogous thereto. Consequently the mental capacity required of an insured should be no less strict than is the testamentary test of capacity. Certainly this is the approach favoured by many Canadian courts.[33]

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27 29 Vict., c. 17.

28 *Ibid.*

29 R.S.B.C., 1960, c. 197, s. 147(1); R.S.N.B., 1952, c. 113, s. 156(1).

30 The Uniform Life Insurance Act was completely revised in 1962. The new revision was enacted by all common law provinces and became effective in those provinces as of July 1, 1962.

31 R.S.N.B., 1952, c. 113, s. 148, as amended by (1960), 9 Eliz. II, c. 41, s. 148.

32 *Doyle v. Doyle,* [1929] 3 D.L.R. 796, *per* Haultain, C.J.S., at p. 798; *In re Griffin,* [1902] 1 Ch. 135, *per* Vaughan Williams, L.J., at p. 140, concerns the Friendly Societies Act which was the predecessor of much of our insurance legislation; *Re Moran,* [1910] O.W.N. 293, *per* Riddell, J., at p. 294; *Clark v. Loftus* (1911), 24 O.L.R. 174, *per* Clute, J., at p. 180; [1912] 4 D.L.R. 39; *cf.* Garrow, J.A., at p. 55; Moss, C.J.O., considered the transaction similar to a gift, at p. 45; Meredith, J.A., considered the transaction was a contract or a gift, at p. 53. *Kerslake v. Gray,* [1957] S.C.R. 516, *per* Cartwright, J., at p. 526; Laverty, F.J., *The Insurance Law of Canada,* 2nd ed., 1936, at p. 50.

33 *Ibid.*

An equally interesting aspect of Mr. Justice Wilson's decision is that it illustrates the evolutionary process of the law. During the nineteenth and early part of the twentieth centuries, the courts tended to look at life insurance as a purely contractual matter between the insured and the insurance company, governed by all the limitations of contract law, privity having the most far reaching implications.[34] Nor did equity offer any relief, for it was seldom that a mere designation of beneficiary was considered sufficient affirmation of an intention to create a trust so as to enable a beneficiary to enforce an insurance contract on his behalf.[35] Thus the beneficiary was in the awkward position of having a "right" to receive the policy proceeds without a remedy to enforce their payment. Some courts have even suggested that if the insurance moneys were paid to the beneficiary he would hold them as a mere volunteer in trust for the estate of the insured.[36] In addition, the benefits of a policy of insurance, like any other contractual right could be seized by the insured's creditors for the payment of his debts. Clearly this approach, while it illustrates the vigour of the privity rule strikes at the rationale of modern life insurance practice. Remedial measures were required. First, the statutory trust was created to protect insurance benefits from creditors.[37] Next, provision was made to give an ordinary beneficiary the right to maintain an action to enforce for his own benefit the payment of insurance money.[38] The courts, too, have taken a hand by holding that the designation of an ordinary beneficiary constitutes a voluntary settlement by the insured in favour of the beneficiary thus making his claim superior to and exempt from the claims of

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34 *Deckert v. The Prudential Insurance Company of America,* [1943] O.R. 448, at p. 449; see also *Cleaver v. Mutual Reserve Fund Life Association,* [1892] 1 Q.B. 147, *per* Lord Esher, M.R., at p. 152; *Gunter v. Williams* (1897), 1 N.B. Eq. R. 400, *per* Barker, J., at p. 403; *Cornwall v. Halifax Banking Co.* (1901-2), 32 S.C.R. 442, *per* Sedgewick, J., at p. 446; *Re Engelbach* (1924), 93 L.T. Ch. 616; McVitty, *Commentary on the Life Insurance Laws of Canada,* p. 141.

35 *Vandepitte v. Preferred Accident Insurance Corporation of New York,* [1933] A.C. 70, *per* Lord Wright, at p. 79.

36 *Cleaver v. Mutual Reserve Fund Life Association,* [1892] 1 Q.B. 147, *per* Lord Esher, at p. 151; *Deckert v. The Prudential Insurance Company of America,* [1943] O.R. 448, *per* Plaxton, J., at p. 449; Halsbury's *Laws of England,* 3rd ed., vol. 22, p. 286; R. D. Taylor, "Beneficiaries of Life Insurance Policies" (1944), 22 Can. Bar Rev., at p. 509. See to the opposite effect: *Cornwall v. Halifax Banking Co.* (1901-2), 32 S.C.R. 442, *per* Sedgewick, J., at p. 447; *Kerslake v. Gray,* [1957] S.C.R. 516, *per* Cartwright, J., at pp. 254-5.

37 R.S.B.C., 1960, c. 197, s. 147(1); R.S.N.B., 1952, c. 113, s. 156(1).

38 R.S.B.C., 1960, c. 197, s. 144(2); R.S.N.B., 1952, c. 113, s. 153(2).

creditors.[39] The decision in the case of *Re Rogers* that the test of mental capacity to be required of an insured designating a beneficiary of the preferred class is the testamentary test of capacity represents another step in this development. While the problem of explaining satisfactorily the legal principles which describe the status of the insured and the beneficiary still remains,[40] the court in *Re Rogers* has admirably brought out the issues. The question remains whether this approach will be applied by the courts to the case of an ordinary beneficiary. Having regard to the protection now afforded such a beneficiary against the claims of the insured's creditors,[41] it would seem likely that the courts will be no less diligent to protect him against an act done by an insured who through mental incapacity has been rendered incapable of appreciating his obligations "so as to bring about a disposal of his property which if his mind had been sound, would not have been made".[42]

Douglas V. Wright*

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39 *In re Roddick* (1896), 27 O.R. 573; *In re Benjamin* (1926), 59 O.L.R. 392; *In re Thompson*, [1940] O.W.N. 546. In *Kerslake v. Gray*, [1957] S.C.R. 516, at p. 518, Kellock, J., giving the judgment of the court (Cartwright, J., dissenting) stated ". . . I am of opinion that s. 161 [R.S.O. 1950, c. 153; R.S.N.B. 1952, c. 113, s. 153; R.S.B.C. 1960, c. 197, s. 144] operates to the same effect as regards ordinary beneficiaries as s. 164 [R.S.N.B. 1952, c. 113, s. 156; R.S.B.C. 1960, c. 197, s. 147] does in the case of preferred. It has for a long time been uniformly held in Ontario that insurance moneys payable to an ordinary beneficiary do not form part of the estate of the insured. Whatever criticism might have been directed at the decision, *In re Roddick; Re Benjamin*, and *Re Jones* [[1933] O.W.N. 48] (and I am not suggesting that the appellant is not well founded in his criticisms of them) there is no basis for criticism since the enactment of s. 161(2) by 1946, c. 42, s. 6 [R.S.N.B., 1952, c. 113, s. 153(2); R.S.B.C., 1960, c. 197, s. 144(2)]." See also Laverty, *The Insurance Law of Canada*, 2nd ed., 1936, at pp. 529-30; *In re Schebsman*, [1944] Ch. D. 83, *per* Lord Green, at p. 89.

40 It is open to question whether the beneficiary has a mere expectancy or a vested interest subject to defeasance. If the former, the insurance might be likened to a testament; however, unlike a testamentary disposition the insurance has immediate effect. If some vesting of interest in the beneficiary takes place then the insurance could be described as a gift, but unlike a gift the insurance benefit is not absolute in effect. Thus a policy of life insurance does not seem to fall into any convenient classification. Perhaps the Scottish concept, stated by MacGillivray, that a direction in a policy may operate with testamentary effect and so create a revocable destination which, in the absence of revocation, is effective to give a good title to the payee is most apt.

41 *Supra*, footnote 39.

42 *Banks v. Goodfellow* (1870), L.R. 5 Q.B. 549, *per* Cockburn, C.J., at p. 565.

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