

## IS THE BUSINESS RECORDS EXCEPTION UNDER THE *EVIDENCE ACT* (ONTARIO) LIMITED BY NECESSITY AND RELIABILITY?

by James C. Morton\*

*Steinberg Morton Frymer LLP*

In *R v Starr* [2000] SCJ 40, the Supreme Court of Canada made it clear that the principled approach was to govern the admission of hearsay evidence. Specifically, hearsay evidence was admissible only if it was both necessary and reliable. The Decision in *Starr* did not consider whether evidence admitted pursuant to an *Evidence Act* statutory exception to the hearsay rule also needed to be justified as being both necessary and reliable. It would seem unlikely that *Starr* would impact on a statutory provision. Presumably the evolution of Common Law, which is the basis for *Starr* (albeit rooted in Charter and other analysis), would not ordinarily impact of a statute. This view, however, was not adopted in a recent Ontario Court of Justice Decision.

The careful and thorough Decision of *R v Felderhof* (September 22, 2005), as yet unreported per Justice Hryn) deals with this issue. Needless to say, in most situations, the Ontario *Evidence Act* is not to be considered in the context of an offence but comes up more generally in civil cases. The *Felderhof* matter, arising under the *Securities Act* (Ontario) deals with the Ontario *Evidence Act*.

In his Decision, Justice Hryn found that the statutory provision was limited by a requirement of reliability. It should be noted that this Decision is based, in large part, on the fact an offence is being prosecuted; the reasoning not apply in a purely civil context. Of course, it would be odd for the same statutory provision to mean two different things depending on the cause of action applicable. That said, the Decision may well be applicable in a civil case; regardless the case sets out the requirements under Section 35 very clearly.

Speaking of the requirement that reliable evidence only be admitted, the Court noted, at page 13:

One of the minimum requirements of the right to be presumed innocent until proven guilty stated by the Supreme Court of Canada in *R v Oakes* [1986] 1 S.C.R. 103 is that "it is the State which must bear the burden of proof.." To admit unreliable evidence as part of the prosecution's case which the defendant would then be required to answer could in that sense unfairly shift the burden of proof.

One can argue that a plaintiff in a civil case bears the burden of proof and the admission of unreliable evidence, regardless of the statutory exemption, would have the effect of shifting a burden onto the defendant to disprove a case. Besides, unreliable evidence ought not to be considered by a Court regardless of whether the evidence is hearsay or otherwise.

In addition to the finding that reliability is a condition precedent to the admissible of evidence under Section 35 of the *Evidence Act* (Ontario), the Court noted specific requirements that must be met before the Section can be triggered. The Court holds, at page 11, the following conditions precedent must be met to admit evidence under Section 35:

Record made on some regular basis, routinely, systematically;

Of an act, transaction, occurrence or event;

And not of opinion, diagnosis, impression, history, summary or recommendation;

Made in the usual and ordinary course of business;

If it was in the usual and ordinary course of such business to make such record;

Pursuant to a business duty;

At the time of such act or within a reasonable time;

And where the record contains hearsay, both the maker and informant must be acting in the usual and ordinary course of business.

*\* This article is intended to provide general information and is not specific legal advice.  
If you have a legal problem, you should not rely on this article alone but should speak to a lawyer.  
James Morton is certified as a specialist in civil litigation by the Law Society of Upper Canada  
and is a partner with Steinberg Morton Frymer a full service law firm in Toronto.  
You can reach James by telephone at 416-225-2777.*