Here We Go Again: Reviving the Real Evidence Distinction under Section 24(2)

The issue of what unconstitutionally obtained evidence will affect the fairness of a subsequent trial has plagued us too long. The Supreme Court’s statement in Collins (1987), 33 C.C.C. (3d) 1 that real evidence will rarely affect the fairness of the trial was taken by many lower courts as an automatic rule that pre-existing real evidence could not affect trial fairness. Now, the Supreme Court’s statement in Stillman (1997), 113 C.C.C. (3d) 321 that the admission of conscriptive evidence such as statements, bodily samples and uses of the body will affect the fairness of the trial is also being taken by lower courts as an absolute rule that the admission of other evidence, what used to be called real evidence, cannot affect trial fairness. The automatic rules imposed by lower courts may simplify decision-making, but they are not based on a purposive reading of the Supreme Court’s decisions.

In Collins, the court took pains not to say that real evidence could never affect the fairness of the trial. Any evidence emanating from the accused and obtained from a conscriptive process that infringed the accused’s right against self-incrimination could affect trial fairness. The issue was not whether evidence was real or not, but whether it was obtained through an unfair process. This did not stop courts, including the Supreme Court, from making shorthand and somewhat sloppy conclusions that because evidence was pre-existing real evidence, it could not affect trial fairness.

In Mellenthin (1992), 76 C.C.C. (3d) 481 and Burlingham (1995), 97 C.C.C. (3d) 385, the court made clear that unconstitutionally obtained real evidence could affect trial fairness. Sometimes this real evidence was derived from a confession, sometimes it was directly handed over to the police. What mattered was whether the accused participated in its discovery. The court’s broader definition of evidence that could affect trial fairness was balanced by allowing the state to demonstrate that it would inevitably have discovered the evidence without a Charter violation. Crime control concerns would be recognized because drugs and guns would frequently have been discovered without a violation.

14 — 42 C.L.Q.
The Supreme Court’s decision in Stillman is quite ambiguous on the crucial issue of what constitutes conscriptive evidence affecting trial fairness. On the one hand, there are plenty of categorical references to conscriptive evidence as statements, bodily samples and uses of the body. Given the facts, the court was most concerned about making clear that bodily samples were conscriptive evidence. On the other hand, there is a recognition that real evidence may be conscriptive if the state obtains it through the accused’s compelled participation. The latter reading is most consistent with the court’s precedents and the principles of the fair trial test first articulated in Collins.

A growing number of Court of Appeals have concluded that conscriptive evidence is limited to statements, bodily substances and uses of the body. Most have based their conclusion on passages from Stillman and an article by Justice Cory. They do not, however, grapple with the fact that Stillman talked about bodily samples because that was what was before the court and the court never disapproved, let alone overruled, Mellenthin.

In Lewis (1998), 122 C.C.C. (3d) 481, at p. 495, Justice Doherty dismissed the sort of participation by the accused that triggered fair trial concerns in Mellenthin as “inconsequential”. I must disagree. An accused forced to hand over or reveal evidence still participates in building the state’s case and this triggers fair trial concerns about self-incrimination. In addition, the accused’s coerced co-operation may mitigate the flagrancy of the violation. The fact that Mellenthin helped the police by opening his gym bag made the s. 8 violation seem less serious than if they had simply rummaged through the bag. Most of us are eager to please when confronted by the police and suspects should not be penalized for being nervous and co-operative. The fair trial test interpreted to catch any evidence produced with the accused’s participation catches subtle forms of police coercion while the serious violation test catches the more obvious abuses.

There are some encouraging signs that the Supreme Court may clean up this growing mess. In his dissent in M. (M.R.) (1998), 129 C.C.C. (3d) 361 at p. 395, Justice Major correctly concluded that drugs revealed by the accused at the request of a vice principal and a police officer constituted conscriptive evidence. He did not classify the drugs as derivative evidence, but noted that the 13-year-old suspect felt compelled to co-operate and his participation was essential to the discovery of the hidden drugs. If someone had simply reached into the suspect’s sock, the search would have been quite serious. The state should not be able to take advantage of nervous suspects who participate in building the case against them.

If drugs that the accused is unconstitutionally forced to produce or reveal can be conscriptive evidence, then the court remains loyal to Mellenthin. Justice Major’s approach follows the broad purposes of the fair trial test about compelled participation and self-incrimination and it should be followed by the court in subsequent cases. If the court is to pay the price for a principled fair trial test, it should be principled in its administration of the test.

K.R.