



Heads UP – Notetaking is a Big Deal!!!!

Information for CPA Members

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Introduction

In the last decade or so, hand-written police notes seem to have become less commonplace, as police have shifted their focus to their in-car laptop computers to prepare the official police reports after an incident or investigation.

However, in the last few years, there has been a renewed focus by the courts and civilian oversight agencies on contemporaneous note-taking by police officers. This issue is now commonly raised by defence counsel when police officers testify and so it is critical that police officers understand the expectations that they must meet in their daily note-taking and report-writing duties. This article will explain why this renewed focus on note-taking has occurred, and what police officers need to do to meet those expectations.

The Case that Shone the Light on the Importance of Police Notes

Over the years, there have been many cases from across the country that have recognized the importance of contemporaneous police notes in criminal investigations. However, it was the 2013 Supreme Court of Canada (“SCC”) case called *Wood v. Schaeffer*,¹ that brought this issue back into focus for defence counsel and civilian oversight bodies. In the years since *Wood v. Schaeffer*, this issue has been front and centre in both criminal cases and in police disciplinary

¹ 2013 SCC 71.

investigations, with police officers being questioned about, and criticized for, insufficient notes. This focus on police notes is expected to continue and so it is imperative that police officers across the country also refocus on taking proper notes in the course of their duties.

You have a Duty to Take Notes

In the *Wood v. Schaeffer* case, the SCC affirmed that police officers have a **DUTY** to prepare **independent, accurate, detailed, and comprehensive notes during an incident or investigation, or as soon as practicable afterwards.**² The SCC cited with approval the comments of others affirming that the duty to prepare such notes is:

- an integral part of a successful investigation and prosecution of an accused; as important as obtaining an incriminating statement, discovering incriminating evidence or locating helpful witnesses.³
- a fundamental part of the broader duty to ensure that those who commit crime are held accountable for them.⁴
- fundamental to the professional role of a police officer, and central to the proper administration of criminal justice.⁵

These pronouncements by the SCC in 2013 prompted defence lawyers to scrutinize police notes more carefully and to raise the issue of inadequate note-taking more often through hard questions in cross-examination and in legal argument later, and they continue to do so. Police officers who have no notes on key issues have been chastised by the courts, and in some cases, their testimony is not believed or is found to be unreliable.⁶ Failure to make notes is also leading to more professional standards investigations and more findings of misconduct for “neglect of duty”.

This trend is not likely to end any time soon, so police officers need to ensure they take adequate contemporaneous notes and that they are ready for any defence questioning on this topic. Indeed, many police departments are in the process of reviewing and revamping their

² *Ibid.*, at paragraphs 67 and 68.

³ Cited in paragraph 65 of *Wood v. Schaeffer*, *Ibid.*, from the Report of the Tarnan Inquiry (2008), prepared by the Honorable R.E. Salhany, at p. 133.

⁴ Cited in paragraph 64 of *Wood v. Schaeffer*, *Ibid.*, from the *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* (1993), at pp. 151 and 153.

⁵ From the Ontario Court of Appeal in *Wood v. Schaeffer*, 2011 ONCA 716, at par. 67 and 69.

⁶ For example, see *R. v. Madore and Medeira*, 2012 BCCA 160.

notetaking policies and training to place more emphasis on the importance of notes, and in particular the importance of independent, accurate, detailed and comprehensive contemporaneous notes. Those that aren't, should be.

What Should You Be Making Notes of?

The notes that you are duty-bound to make are notes about the FACTS, i.e. what happened, what you saw and heard, what you said or did, and what witnesses have told you. The SCC in *Wood v. Schaeffer* put it this way:

*The purpose of notes is not to explain or justify the facts, but simply to set them out. Indeed, until human ingenuity develops a technology that can record sights, sounds, smells, and touch, an officer's notes are effectively the next best thing.*⁷

And in response to an argument that police officers should be entitled to get legal advice before completing their duty notes (which was one of the specific issues in *Schaeffer* arising from the Ontario regulations), the SCC said:

*But this creates a real risk that the focus of an officer's notes will shift — perhaps overtly, perhaps more subtly — away from the rather mechanical recantation of what occurred (which is required by their duty) toward a more sophisticated explanation for why the incident occurred (which detracts from that duty).*⁸

This means that you have a duty to complete basic notes about what happened (the facts) as soon after the event as possible and prior to obtaining legal advice. *Schaeffer* also confirmed that after providing these basic duty notes, you are entitled to obtain legal advice before you have to answer questions or give a statement to any oversight or investigative body that is investigating the incident.

⁷ *Wood v. Schaeffer*, supra., at par. 76

⁸ *Ibid.*, par. 77.

Why Are Contemporaneous Notes So Important?

- (1) **They Go to Your Credibility and Professionalism** – Given that police officers **HAVE A DUTY** to prepare ACCURATE, DETAILED, AND COMPREHENSIVE NOTES during or as soon as possible after an incident, the failure to do so will have an obvious negative effect on the credibility of any police officer. The lack of notes alone will give defence counsel fodder to question your professionalism and attention to detail. Defence will try to paint you in a bad light and then will invite the court to ask, *if this police officer couldn't even bother to fulfil the important, but simple, duty of contemporaneous note-taking, then what else did he/she cut corners on?*
- (2) **They Bolster the Reliability of Your Testimony and the Weight it Will be Given** – Having corresponding notes that were made contemporaneously to the events in question will undoubtedly bolster the reliability of your testimony about what you observed, heard, said and did during an incident that may have taken place months or years previously (assuming of course that your notes are consistent with your testimony). Conversely, a lack of notes may convince a judge to give your recollection little weight, especially in the face of contradictory accounts by the accused and/or his/her witnesses or challenges from defence counsel.⁹
- (3) **They Ensure the Most Accurate and Detailed Account of What Happened** – This point is related to the previous one. The duty to make contemporaneous notes is based on the notion that, if you write something down at the time it occurs (rather than hours or days later), your recollection will be more accurate and more detailed. So preparing **comprehensive contemporaneous notes** will ensure a more accurate and more detailed account of what occurred. And since part of a police officer's job is to document what happened, this will help to ensure that the most complete picture of what happened will be recorded.

As well, writing detailed contemporaneous notes will ensure that all of the details, including small details such as dates of birth, the times when important things happened, and the exact content of conversations, will be preserved. This is obviously important in any criminal investigation. In one case where police failed to take adequate notes about their dealings with the accused in which he allegedly gave them consent to search his residence (which he now disputed), the judge put it this way:

⁹ Wood v. Schaeffer, 2011 ONCA 716, at para. 70. See also for example, R. v. Whitton, 2016 BCSC 2518 where the BC Supreme Court found an officer's memory to be unreliable regarding what grounds he had to arrest the accused partially due to a lack of notes.

“The sin in the case at bar is the failure by the police after they found the marihuana grow operation and arrested the accused to sit down and do their best ... to put themselves in a position later to tell a judge what went on, the back and forth, the problems, as [the officer] dealt with the accused and his wife. the Crown properly concedes that it cannot provide a decent body of evidence on which I can pass independent judgment on whether the upshot of what passed between the officers and these two people amounted to a consent to enter the house. ...

... It is reasonable for the courts to expect any officer in the position of the police in this case – after the discovering of the marihuana grow operation and the arresting of the accused – to act on the assumption that someday in the future a court may very well have to pass separate judgment on the effect of what was said and done and gesticulated that night.

In the circumstances of this case, for the police ... not to sit down at the earliest opportunity to do their best to record the detail of what had passed between the police and the accused and his wife was inexcusable.”¹⁰

[Emphasis added]

- (4) They Back Up Your Version of Events** – Detailed notes made at the time of, or very shortly after, an incident are almost as good as having a corroborating witness who can back up what you are saying happened.

Because the notes were written at the time and you had a duty to record what happened, they will be considered to be accurate. And because they were made prior to, and without knowledge of, any possible issues and arguments to be raised in court, and before any complaint or other criticism of you has been made, the notes will carry a great deal of weight in terms of corroborating what you are saying occurred.

On the other hand, testifying in court about something for which you have no notes, or writing out a statement after a complaint comes in, can appear to be self-serving. And considering that you had a DUTY to write detailed notes at the time but didn't, the court may consider the lack of notes as proof that what you are now saying happened, in fact didn't. Defence will say, *“if what this officer says happened had actually happened, this officer would have made a note about it at the time because he/she had a duty to.”* In other words, a lack of notes will be used against you and your version of events.

¹⁰ R v. Truong, 2010 BCSC 1956.

As with all witnesses, the courts do not automatically believe everything a police officer tells them. For police officers to ensure that they are believed in court these days, they need one of the following (in no particular order):

- (a) a civilian witness who backs up their story,
- (b) corroborating physical evidence,
- (c) a video recording of the events, OR
- (d) detailed and accurate contemporaneous notes.

Given that (d) is the only option that is generally within your control, you should think of your contemporaneous notes as your silent witness, a witness that is going to help you to be believed and to project the image of professionalism that every police officer wants to project.

Advice for Carrying out Your Note-Taking and Report Writing Duties

Independent, accurate, detailed and comprehensive contemporaneous notes are your duty. This does not mean that you have to spend hours writing every little detail by hand in your notebook and then immediately transpose that entire text into your police report. Here are some tips to ensure that you satisfy the expectations placed upon you:

1. **Always Make Notes of Important Details** - Whether or not you are going to prepare a full police report, you must always make contemporaneous handwritten notes in your notebook of specific important details that any person would normally have difficulty remembering, even for brief periods. This includes things like: (a) licence plate numbers, (b) identity card numbers, (c) addresses, (d) telephone numbers, (e) *Charter* and police warnings (what was said, the subject's responses, and the times of both) and (f) the times of critical events. If you are planning to prepare a full police report, it will be acceptable to use personal short-hand in your notebook that you will expand upon in the report.
2. **Proper Approach if You will be Writing Your Police Report Right Away** - IF you are authoring a police report at the time of the events, or very shortly thereafter (within a couple of hours), then that report may be considered to be part of your notes – in which case your notes would be a combination of hand-written notes and your police report. This is acceptable BUT ONLY if you follow these rules:
 - Your police report MUST be authored by you and no one else.

- Your police report must be written at the time of the incident or as shortly thereafter as possible. A delay of more than a couple of hours may limit the value of that report as your “notes”, in the eyes of a court, because it was not truly contemporaneous to the events.
 - You should clearly state, in your police report and in court when testifying, that your police report, having been written by you contemporaneously to the event in question, forms part of your notes. As well, your notebook should say something like this: “See my [*specify the police report*] for further evidence.”
 - You must be very careful to make sure that the information in your police report is consistent with your hand-written notes. Check dates and licence plate numbers digit by digit, and go back and double check everything.
 - When you are preparing your police report, you may notice that you made a mistake in your notes. You may have gotten a date wrong, or even misstated a substantive detail. In that case, explain in your police report what information you are correcting, and why. In your notebook, create a separate entry, with date and time, which directs the reader to the police report for a correction. Do not change or “correct” the erroneous entry in the notebook.
 - If defence counsel ever questions you in court about notes, or lack thereof, you must take the time to educate the judge about the fact that you wrote the police report contemporaneously (i.e., be able to describe how, where, when you wrote it) and that you consider this report to be part of your notes, such that you have not hand-written every detail into your notebook. If your police report was prepared electronically on an in-car computer, educate the judge about (1) your laptop computer, (2) how you wrote the detailed account of the incident directly into your laptop at the time of the incident, or shortly thereafter (i.e., be able to describe how, where, when you wrote it) and (3) the fact that you consider your electronic report to form part of your notes.
3. Proper Approach if Your Police Report Won’t be Written until Later - On the other hand, if you are **NOT** going to write your police report until much later (hours or days later), then it is essential that you take the time necessary to handwrite detailed notes in your notebook contemporaneously with the events (i.e. at the time or as soon as possible afterwards). This would include not only the fine details that you won’t otherwise remember (although, as noted above, that too is important), but also ANY key facts and circumstances that you relied upon to give you grounds to arrest or

detain, grounds to use force, or to search someone or something, or seize anything, EVEN IF the detail is something that you think you will never forget or something that you think will be obvious to everyone.

Completing a detailed police report or detailed notes contemporaneously with the incident may mean that in some circumstances, you will have to stay late so that you can complete your notes (or report) prior to leaving work. You may even need to ask your NCO to authorize an extended tour of duty to allow you to be as thorough as necessary to fulfil your note-taking duty. It is not appropriate for anyone to advise you to complete your notes upon your return to work after an extended absence (next shift, weekly leave etc).

Also note that the advice given above, about ensuring the consistency between your hand written notes and your police report is doubly important where you have detailed notes, and are going to prepare a detailed electronic report as well.

Before following this advice, check the governing legislation for your police service and your police department's notetaking policy to ensure that you are following them and that they do not contradict the advice given here.

Conclusion

It is a mistake for police officers to think of note-taking as an inconvenient administrative task. Your notes are your best CYA. For each and every incident you attend, you are urged to take the time necessary to prepare a detailed account of everything that occurred, either in your notebook or in a police report, before you rush away to take the next call. There will always be pressure to get back out there to take the next call, but your DUTY is to make sure your notes are complete before you move on to the next call. Don't ignore your duty, and in the process sacrifice your professionalism and possibly your credibility, because you will likely live to regret it.

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This article is intended to provide members of the CPA with general information that will assist them in performing their police duties. This article is not, and is not intended to be, legal advice. Any member requiring legal advice regarding a specific case or issue, should seek advice from their supervisor or the legal counsel for their Police Department.