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<p>A Guide to BREATHALYZER CERTIFICATES IN CANADA Alan Pearse Release No. 3, August 2025</p>

What’s New in This Update

This release features to the updates in Chapters 2 (Stopping The Ac-
cused), 4 (Screening Demands), 5 (Reasonable and Probable Grounds).

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Highlights

All parties will want to review: *R. v. Kopperud*, 2024 CarswellSask 458, 2024 SKPC 30 (Sask. Prov. Ct.). The accused was driving a motor vehicle in Regina, Saskatchewan, ready to start her day. She pulled into her usual parking stall, but just as she prepared to exit her vehicle, the voice of an RCMP officer cut through the quiet. The constable had stopped his police cruiser directly behind her, affectively boxing her in. The constable demanded that the accused provide him with a sample of her breath. When the accused questioned his authority, the constable responded that if he finds someone driving a motor vehicle that he can make a breath demand, and that “he didn’t have to have any reason.” The officer was apparently under the impression that he could stop her randomly on the street and demand a breath sample. The constable was dispatched that morning in response to a 911 report of erratic driving. The caller reported that another vehicle had driven up close behind him and nearly collided with oncoming traffic. The driver in question was the accused. After passing the complainant’s vehicle she continued towards the city, and her driving reportedly improved. The complainant chose to follow her while remaining on the line with the police, noting that she drove normally for the rest of the journey down the highway and into the industrial area of Regina. At the time of the report, the officer was in the east of Regina. He drove at high speeds and manoeuvred through traffic on grid roads and secondary highways in an attempt to intercept the accused. This pursuit included passing vehicles, running stop signs, and turning left onto a highway against a red light, even using the oncoming lane. His driving forced morning commuters to swerve or stop to avoid collision as he navigated rapidly across the roads. The officer finally located the accused turning into her workplace parking lot. The officer then deactivated his emergency lights and siren just as he caught up to the accused. Only after the accused had parked did he reactivate his emergency lights and block her vehicle in the parking stall. When the accused attempted to exit her vehicle, the constable ordered her back inside. Approaching her vehicle on foot, he informed her of the complaint, indicating that she had been “all over the road.” The accused denied this, asserting that her driving have been appropriate. The constable then checked on her paperwork and assessed her sobriety. The accused provided her driver’s license and denied any alcohol or drug use. Upon inspection, the accused found no signs of impairment. There was no odour of alcohol, slurred speech, bloodshot eyes or any visible alcohol in the vehicle. After conducting standard police checks in his vehicle, the officer returned to inform the accused that she was required to provide a breath sample using an ASD. The accused questioned the demand, asking why it was necessary if she had done nothing wrong, and what the consequences of refusal would be. The constable explained that he did not require specific grounds to make the

demand and outlined the penalty for refusal. After making two additional demands, the constable ultimately arrested and charged the accused was refusing to provide a breath sample. In 2018 Parliament introduced Bill C-46 that made changes to the Criminal Code of Canada to allow police officers equipped with an ASD to demand breath samples from drivers as they wish, fairly randomly and with no grounds required. There is no other provision in the criminal code allows for such a groundless search and seizure with no articulable cause. This is the MAS provision under CC 320.27(2). There are two prerequisites for lawful MAS demand. First of all, the officer must possess an ASD and secondly the demand must be made in the lawful exercise of police powers. The MAS section does not create a new or standalone power for police to stop motor vehicles. This provision only gives police the authority to make the demand. A police officer must be acting within the scope of lawful authority, either statutory or common law, when initiating a traffic stop for the purpose of making an MAS demand. In this context, an MAS demand is lawful only if the vehicle stop itself is lawful. The statutory authority of police officers to stop and detain drivers is found in *Traffic Safety Act* 209.1. This section is commonly recognized as the power of police to conduct random or routine stops. The substantial law of Saskatchewan establishes that TSA 209.1 does not confer authority on police to conduct random stops on private property, including private parking areas. This principle is consistent with of the decisions that limit random stops to public roadways and valid traffic safety purposes, unless police have reasonable grounds to initiate a stop based on safety concerns or legal compliance. There are broad range of legal and policy factors for reaching the conclusion that this section does not authorize peace officers to conduct random stops on private property. First of all, regarding the purpose of The *Traffic Safety Act*, the overarching objective is to ensure the safe operation of motor vehicles on a “highway.” The TSA’s provisions, including random stops, are primarily intended to apply to highways, not private parking areas. Regarding the legislative intent, the legislature did not include private parking areas in the definition of “highway” in the TSA, unlike some other provinces. This exclusion indicates that the legislature did not intend to authorize random stops on private property. Regarding strict interpretation of penal statutes, because these statutes can result in fines, forfeiture or imprisonment, they should be interpreted strictly. Any ambiguity should be resolved in favour the individual whom the statute is enforced. Further, legislation that encroaches on individual rights, such as the right to privacy and liberty, must do so in clear terms. The TSA specifically lists many other provisions as to the rules governing parking lots. Notably absent from this list is section 209.1 which authorizes random police stops. The logical conclusion to be drawn from all of the above is that the power of police to conduct random stops under 209.1 of the TSA is limited to highways and does not extend to non-highway areas such as parking lots, whether privately or publicly owned. The police

must communicate their intention to initiate a random stop by signalling or requesting the driver to stop their vehicle on a highway to engage section 209.1 of the *Traffic Safety Act*. Police cannot use this authority to conduct a random stop on private property merely because they formed a subjective intention to stop a driver while they were on the highway. Random sobriety stops are not the only tool available to the police to address impaired driving. While provincial traffic safety legislation does not prevent random stops on private property, police can still stop drivers if they have reasonable and probable grounds, thus insuring impaired drivers can still be lawfully detained. It is also important to respect the will of the legislature. The court's role is to interpret the laws as written. The provincial traffic safety legislation does not authorize random stops on private property and is not the court's role to rewrite the laws. If the legislature deems it necessary to grant broader powers under provincial traffic safety legislation, it is up to the legislature to amend the provisions. Courts often treat attempts to flee from police, even onto private property, as evidence of wrongdoing or flight, which can establish reasonable and probable grounds for further action and detention. Fleeing drivers may also face additional legal charges beyond impaired driving, such as evading police or obstruction of justice. It is equally problematic and pernicious to assume that a driver would intentionally flee onto private property to avoid a police stop as it is to imply that a police officer would fabricate having formed a prior intention or grounds to stop. Both assumptions undermine trust in law enforcement and driver conduct in ways that are speculative or unjustified. Impaired driving is already a criminal offence, allowing police officers to exercise investigative powers under the criminal code and common law that allow for broader scope for intervention in impaired driving cases that extend beyond random sobriety checks, including on private property under certain circumstances. This framework lessens reliance on random sobriety checks as the sole prevention method. Public policy measures like public awareness campaigns and stricter penalties for impaired driving serve as significant deterrence, irrespective of where the offence occurs. Private property does not provide a true refuge because the public, including the property owners and other witnesses thereon, can report impaired drivers. Community involvement often aids in the identification and apprehension of impaired drivers, even when police are not initially authorized as such. TSA 209.1 does not authorize police to randomly stop a vehicle on private property unless they have first communicated their intent to stop by signalling or requesting the driver to stop while the vehicle was still on a public highway. However, police are permitted to stop a vehicle on private property if they have reasonable grounds to suspect the driver has committed a crime or traffic safety infraction. More specifically, police cannot stop a vehicle on private property unless they either signal the driver to stop while still on a public road, or have a reasonable suspicion the driver committed an offence. This legal principle aligns with the common-law

power of investigative detentions and is subject to other common-law doctrines such as hot pursuit, the implied license to enter, approach and knock, police 911 emergency powers, and related legal frameworks. When a court is called upon to assess police powers regarding random stops on nonhighway areas without any reasonable suspicion and wrongdoing, it is critical to recognize the related legal implications. Such powers must remain consistent with the constitutionality of random stops on highways and the screening provision sections under CC 320.27. Courts are tasked with balancing the public interest in reducing impaired driving with the necessity to uphold drivers' rights under Charter of Rights and Freedoms. This balancing is foundational to any potential extension of police powers on private property. There are several compelling reasons to limit police authority in such a context. For example, private property holds a distinct legal status that confers a heightened expectation of privacy. The law aims to protect private spaces from arbitrary state intrusion. Expanding police powers to allow random stops in these areas risks undermining this principle. Intrusions into privacy rights are more pronounced on private property than on public roads and permitting such stops could erode the boundary between public and private spaces. Courts must safeguard this distinction to protect against unwarranted encroachments on property owners and individual rights. The rationale for random stops is strongest where the public safety is most directly at risk, i.e. on public roads. Impaired drivers on highways in public streets pose immediate dangers to other motorists and pedestrians. On private property, this risk is greatly less acute, weakening the public safety justifications for random stops. Expanding police powers to private property could divert resources from public roads, where the public safety threat is most pressing. Therefore, it is prudent to limit random stops to public spaces, ensuring that police resources are concentrated where they will have the greatest impact. Allowing police to conduct random stops on private property without reasonable grounds introduces a significant risk of arbitrary enforcement. Unlike public roads, where police intervention is justified by public safety concerns, private property typically presents fewer circumstances justifying such broad powers. Without the safeguard of reasonable suspicion, there is potential for police authority to be exercised inconsistently, overreaching, or in a discretionary manner. This could lead to selective enforcement or the targeting of specific individuals or groups, undermining public trust in law enforcement and contravening the rule of law. Courts must remain vigilant in preventing such overreach. In recent decades, the scope of police powers during routine traffic stop has expanded considerably, encroaching further on drivers' rights under the Charter of Rights and Freedoms. Initially, police required articulable cause to pull a vehicle over, but over time, exceptions have grown in number and scope, allowing for random stops without grounds. Legislatures and courts have progressively broadened the scope of permissible police actions during stops, even

absent any suspicion of wrongdoing. While the courts have acknowledged that these powers infringe on fundamental rights, including the right against self-incrimination, unreasonable search and seizure, arbitrary detention, and the right to counsel, they have nonetheless upheld these limits under CRF 1 as justified in the interests of public safety. As these powers expand so does the risk of eroding constitutional protections. What were once brief roadside checks for license and registration now involve extensive investigations and testing procedures, including roadside sobriety tests and police computerized background checks. Drivers may even be required to exit their own vehicles and enter a police vehicle for the purpose of further random testing, all while their constitutional rights have been suspended. This growing intrusion underscores the need to establish strict boundaries on police authority, ensuring that these random stops, necessary on public roads, do not extend to private property, where the justification for such intrusive power is much weaker. The progressive expansion of police powers while constitutional rights are restricted is akin to opening the floodgates of a dam. Just as unchecked water can spill over and damage property, unchecked police authority threatens to overflow into constitutionally protected spaces, eroding individual rights. The broader the scope of police power, the more vital it becomes to shore up and fortify legal safeguards ensuring that these powers remain contained within the proper limits. The judiciary plays an essential role in ensuring that police powers are exercised within legal limits, especially where constitutional rights are implicated. Expanding police authority to conduct random stops on private property, absent clear legislative direction or a compelling public safety justification risks undermining constitutional protections. Judicial oversight is necessary to maintain the balance between individual freedoms and state power. Courts must interpret police powers with restraint to ensure citizens rights to privacy and legal counsel, as well as protection from arbitrary detention, unlawful search and seizure and self-incrimination are not unjustifiably compromised. In this respect, the judiciary serves as a crucial check on state power, preserving the integrity of constitutional rights. In the case at bar, the constable attempted to intercept the accused's vehicle to conduct a general traffic safety stop. However, by the time he caught up to her, she had arrived her destination and was turning into a parking lot. There is no indication that she entered into the parking lot at work to evade the police. The constable deactivated his emergency lights and siren and did not signal for the accused to pull over. Instead, he followed her inside the parking lot for a considerable distance. It was only after the accused had parked her vehicle that the constable reactivated his lights and formally initiated a traffic stop. Up to this point, the constable had not observed any unusual driving behaviour or signs of impairment; he was merely exercising his authority under the TSA to conduct a routine traffic stop. Even after exiting his police vehicle and interacting with the accused, the constable did not observe any signs of impairment. Nevertheless, he

demanded that she provide a breath sample. The accused refused and she was charged with a criminal offence. The officer in this case lacked the statutory authority under TSA 209.1 to conduct a random stop on private property. Accordingly, the traffic stop was not lawful. A prior police intent to stop a vehicle while it was on a public road is no longer relevant. Even if this consideration was still legally relevant, the constable in this case had not formed a specific intent to stop the accused's vehicle when he first observed it on the public highway, moments before she turned into her parking lot at work. An abstract or eventual intention to stop a driver at some point in the future is not equivalent to a concrete intention to initiate a stop while actively following the vehicle. The constable testified that he initially hoped to "intercept" or "cut off" the vehicle when he located it, yet when he did catch up, he did not signal or attempt to stop the vehicle. He followed it onto the public street and into the private parking lot a considerable distance without indicating any requirement to stop. He never signalled a request to the driver to stop the entire time the vehicle was in motion. He wanted to independently observe and assess the driving pattern first. It was not until after the vehicle had come to a complete stop and parked that he decided to initiate a traffic stop. As such, the MAS demand was invalid and the accused was acquitted.

