OPEN HOUSE

Forget the Charter of Rights. Nowadays, government officials can
Snoop around your home almost whenever they please.

By EDWARD HORE

"A man's house is his castle" 'is a popular way of expressing an old and venerable legal principle, established in the case of ***Entick v. Carrington*** in England in 1765: the state cannot enter your home or business without your consent unless it first obtains a search warrant. Earlier, addressing Parliament in 1763, English Prime Minister William Pitt eloquently described the common-law right to privacy in these words: "The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail - its roof may shake - the wind may blow through it - the storm may enter - the rain may enter - but the King of England cannot enter - all his force dares not cross the threshold of the ruined tenement."

It is because of this principle that the police must get a warrant before searching your house or business — even if you are Jack the Ripper. The officer must prove to a justice of the peace, before the search takes place, that there are reasonable grounds to believe evidence of a crime will be found on the premises. The justice of the peace, a relatively impartial person, must then consider whether the state's interest in the search outweighs the individual's right to privacy. If an overzealous official or police officer wants to enter private property for an improper or insufficient reason, the justice of the peace will disallow the search. If, on the other hand, there appears to be a good cause, he will issue the search warrant, perhaps adding certain limits; for example, that the search must be conducted during business hours, or that only items that are relevant to the purpose of the search be seized.

In recent decades, however, the state's power to enter a home or business has expanded enormously. Although in most cases the Criminal Code still requires a search warrant for a search or seizure in the criminal context, many "regulatory" statutes now entitle government officials to enter private property without a warrant in order to make what the courts call "administrative searches." That means government officials such as building inspectors, Employment Standards officers, welfare workers, and so on, can decide to look around your home or your business without having the authorization from a justice of the peace.

In fact, regulatory statutes now entitle government officials to enter private property without a warrant almost routinely. The 1983 Ontario Law Reform Commission Report on "Powers of Entry" identified 1,359 statutory powers of entry on the books in Ontario alone, in everything from the Dead Animal Disposal Act to the Denture Therapists Act. And although no-one seems to have counted, it's likely the statutes of other provinces and the federal government contain a comparable number of powers of entry. The commission concluded, "It is clear that what was once regarded as an extraordinary measure has now become commonplace in Ontario statutes and subordinate legislation." As a result, officialdom today has much wider powers to inspect,

audit, or investigate, or just plain snoop around the citizen's private premises. The assumptions behind this is that officials can be trusted to act with more discretion than they once did, and that the government needs to check upon ordinary Canadians more than it has in the past.

Section 8 of the Charter of Rights and Freedoms, which guarantees protection against "unreasonable search or seizure," hasn't changed these powers much either. In considering Section 8, the courts have said that a different standard can be applied to determining the "reasonableness" of a search if it arises out of a regulatory statute rather than from law enforcement. In other words, as long as the government official conducting the search is not a police officer, the courts reason, a warrantless search under a statutory power is likely to be reasonable, on the theory that the search is less intrusive. As Mr. Justice James Hugessen of the Federal Court of Appeal wrote in a recent case, "There is a difference in kind between the tramp of jackboots and the sniff of the inspector of drains."

Yet an inspection of a restaurant by a government health inspector, for example, is not necessarily less intrusive to the restaurant owner than a search by a police officer would be. Both officially have the power to impose very serious penalties if the search turns up an infraction of the law. Both can abuse their power, if allowed to enter wherever and whenever they want.

A number of appellate-level courts across Canada have recently said regulatory searches without warrants are reasonable, and therefore not infringements of the Charter. For example, in 1985, a taxi company, Belgoma Transportation Limited, in Sault Ste. Marie, Ontario, challenged a section of the Employment Standards Act that allows an employment officer to enter a business without a warrant, require the production of documents, and remove them for copying. Belgoma argued that this infringed its right to be secure against unreasonable search or seizure under the Charter. The Ontario Court of Appeal decided that the power of entry under the act was reasonable, although it left open the question of whether this was a "search or seizure" within Section 8. The court discussed the importance to the province of fire safety and health inspections. It cited the large number of search powers identified by the Law Reform Commission as evidence of the importance of warrantless inspections and spot audits.

In essence, the court permitted searches without a warrant by government officials on the grounds that in enforcing regulatory statutes the public interest outweighs the individual's right to privacy. But this begs the question why does the public interest in the enforcement of criminal law not outweigh the individual's right to privacy? Why does the law protect the suspected criminal from being searched without a warrant, but not the ordinary businessman or home owner?

In Manitoba, administrative searches have been upheld on the grounds that the individual being searched had consented to a regulatory scheme. In one case, the Manitoba Horse Racing Commission acted under a power in a Manitoba law that authorized the commission to enter and

inspect racetrack stables without a warrant. The stable owners argued this infringed Section 8. The Manitoba Court of Appeal said that simply by applying for and obtaining a racing-track license, the owners had agreed to comply with the rules of the commission and had therefore consented to their enforcement. The court then rejected an argument that the search was unreasonable, although the stable owners had no alternative other than to comply with the rules of the commission if they wanted to continue to run a stable.

Some regulatory statutes that authorize warrantless entry distinguish between business premises and homes, or specify that the search should be made during business hours, but most don't. Some regulatory statutes specifically authorize entry into homes without a warrant. For example, in British Columbia, Gordon Bichel refused to let a municipal building inspector enter his house without a warrant, and was charged with three counts of' 'unlawfully preventing a District of North Vancouver building inspector from entering the premises." In 1986, the B.C. Court of Appeal held that the search was reasonable on the grounds that insisting on a warrant in such a situation would put an unreasonable burden on the municipal authorities. The court then stated that it is in the public interest to do spot inspections of homes to ensure that the owners are complying with zoning bylaws, and also noted that "there is no stigma attached to the search."

The U.S. Supreme Court, in essentially the same situation, required municipal inspectors to obtain search warrants before entering houses. The court agreed that it was in the public interest to do municipal inspections, but nonetheless ruled that municipal officials should not be given complete discretion as to when it is appropriate to enter a private house. But the court also said inspectors do not need to show the justice of the peace that they have probable cause for thinking there is a violation of the law on the premises at each and every house they want to enter; instead they can point to such factors as the passage of time or the condition of the neighborhood to demonstrate the need to do inspections of the entire area. Thus, allowances were made in the authorization process to ensure the proper administration of municipal bylaws, yet the discretion of government officials was still subject to an impartial check.

Under some statutes in Canada, the government can save itself the trouble of searching your premises by ordering you to hand over all records in your possession, again without prior authorization by a justice of the peace. Thomson Newspapers Limited recently went to court to argue that an order that it produce all corporate records relevant to a combines investigation amounted to unreasonable search and seizure. Thomson's point was that, although there had been no actual entry by officials onto its business premises, the order was just as intrusive as a search, or more so, because of the disruption of business and the time lost in complying with the order.

Although it doesn't seem particularly onerous to require government investigators to get authorization from some impartial person before ordering someone to suddenly hand over all his business records, the Ontario Court of Appeal refused to say the order was unreasonable — thus permitting sweeping powers to be exercised at the whim of combines investigators. The court

considered the order to be acceptable because under the Combines Investigation Act the person or business under investigation could go to court to argue that an order is unreasonable, before handing over records. Thus the court shifted the legal burden away from the government. Instead of having to go before a justice of the peace to show what grounds they have for suspecting the law has been violated, combines investigators can simply make the order, and put the onus on the subject of that order to go to court to show why he shouldn't have to reveal his records. (The Thomson case will be heard by the Supreme Court of Canada in November.)

Perhaps because of their traditional acceptance of authority, Canadians have shown very little concern about the gradual growth of the state's power to enter private premises. The Ontario Law Reform Commission reported in 1983 that it couldn't come up with a single complaint about entry by government officials. But the number of Charter challenges to administrative searches suggests that some Canadians, at least, think the government's powers of entry may be a little too sweeping. After all Government officials have always been allowed to enter your house if you consent. Statutory powers come into play only if yon don't want to let the officials in your door.

It could be that the disadvantages of this erosion of the common-law right to privacy are offset by the benefits of a vastly expanded government regulatory apparatus. But perhaps Canadians might be wise to heed the warning of the French political thinker Jean-Francois Revel, who recently wrote of the modern state," "its power borders on the absolute partly because it is scarcely felt, having increased by imperceptible stages the wish of its subjects."