

February 2014

Contact:

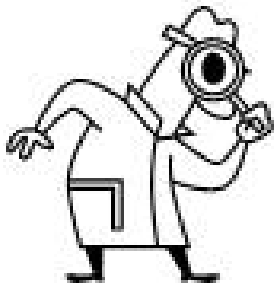
Penny Hill, Chapter Administrator:

[acfe.toronto@sympatico.ca](mailto:acfe.toronto@sympatico.ca)

Brenda Young, CFE, Newsletter Editor:

[toronto.newsletter@live.ca](mailto:toronto.newsletter@live.ca)

## MARK YOUR CALENDARS!



## NEXT YEAR'S ANNUAL TORONTO FRAUD FORUM

**TUESDAY SEPTEMBER 23, 2014**

### 2014 ANNUAL TORONTO ONE-DAY FRAUD CONFERENCE

(Two Tracks – Insurance Fraud & General Fraud)

- DATE:** Tuesday September 23, 2014
- VENUE:** Le Parc Dining and Banquet  
8432 Leslie St. Thornhill, ON L3T 7M6  
(Hyw#7 & South on Leslie St. about 500 meters)
- JOINT HOSTS:** ACFE - Association of Certified Fraud Examiners -  
Toronto Chapter
- CASIU – Canadian Association of Special  
Investigation Units – Trillium Chapter
- COST:** TBA
- REGISTRATION:** Brochure and Registration form will be available in  
June 2014 from our website:  
[www.acfetoronto.ca](http://www.acfetoronto.ca) OR [www.casiu.ca](http://www.casiu.ca)

## ACFE Toronto Chapter Website

Looking good! If you haven't noticed yet, our website has a new look.

Check out the ACFE Toronto Chapter's new look:

[www.acfetoronto.ca](http://www.acfetoronto.ca)

## January 2014 Dinner Meeting: Spotting Deception in Written Statements

The first dinner meeting of the year was held on January 28, 2014 at The University Club.

The directors of the ACFE Toronto Chapter would like to express our gratitude to David Oswald, CPA, CA, of Ernst & Young who stepped in when our scheduled speaker, Jeffrey Weigensberg, CPA, CA, LPA, CISA, CFE, CFF, CIA, of Rosenthal Zaretsky Niman & Co. became ill.

We would like to congratulate Teresa Zywulko. Teresa was the winner in our draw for an ACFE messenger bag and free admission to an ACFE dinner meeting.

All registrants names are entered for the draw at the end of the meeting.

Please join us for our next dinner meeting, on February 25, 2014. Please see the back page of this newsletter for details.



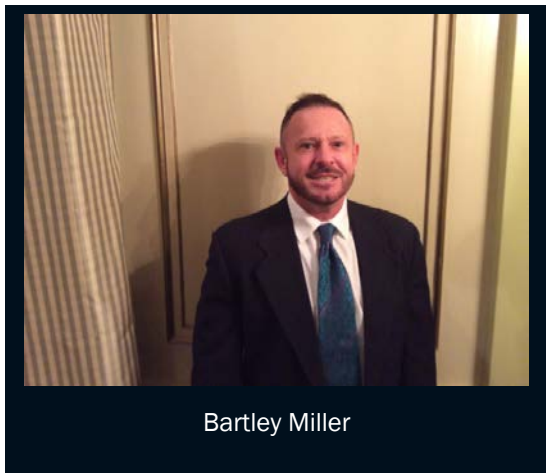
## January 2014 Dinner Meeting continued from page 1



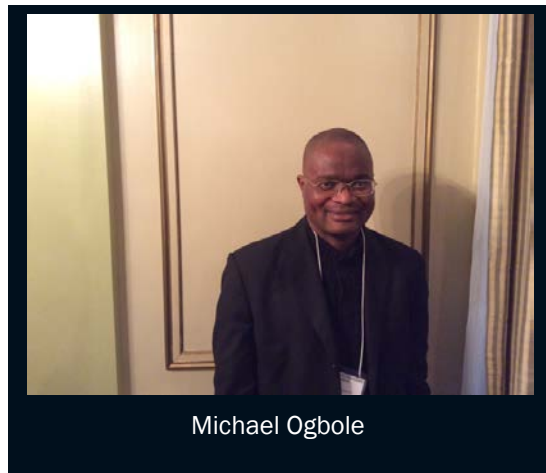
Linda Lister, Vice-President and membership director of the Toronto Chapter ACFE, congratulates Teresa Zywulko, the winner of the dinner meeting draw.

## Congratulations New CFE's

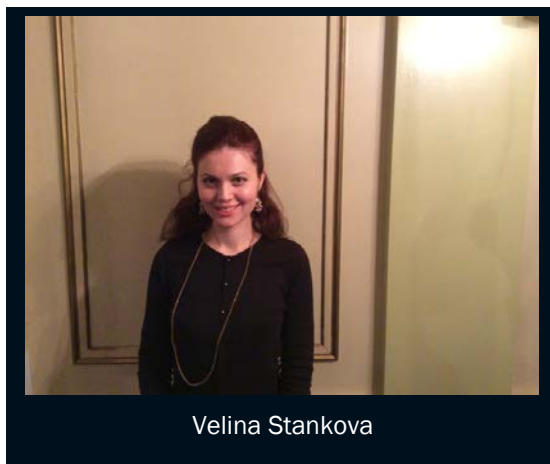
The ACFE – Toronto Chapter would like to congratulate the following individuals for their achievement of obtaining their CFE designation.



Bartley Miller



Michael Ogbole



Velina Stankova



# The Norwich Pharmacal Order: A Primer

By Reid Lester

A Norwich Pharmacal Order is an equitable order which allows a plaintiff to obtain pre-action production of documents in order to enable the plaintiff to identify a potential defendant, or to identify the existence or destination of funds. Essentially, the principle behind the Order is that it would require that a third party respondent (i.e. like a bank) disclose certain documents or information to the applicant while keeping the existence of the Order secret from any other parties (such as potential defendants). The respondent must be a party who is involved or mixed up in a wrongdoing, whether innocently or not, and is unlikely to be a party to the potential proceedings (i.e. like a bank whose customer maintains an account into which stolen funds were deposited).

A Norwich Order is an extremely useful tool for, among other things, obtaining a fraudster's bank account information in advance of a law suit and without the fraudster's knowledge. This in turn can allow a victim/plaintiff to identify stolen funds and to trace such funds in other assets, thereby enabling the plaintiff to freeze such assets. Such information can also allow the victim to prove the fraud (more fully than would otherwise be the case) and to identify other potential defendants. A couple case studies, set out below, illustrate just how useful this order can be, in the right circumstances.

## 1. Malevolent Mike

Mike was the Purchasing Manager for a large office supplies company, ABC Ltd. His employer purchased large amounts of copy paper to use as a base ingredient in the manufacturer of many of these office products. One of Mike's main responsibilities was to source the paper from a variety of paper brokers and manufacturers. He had authority on behalf of ABC to issue purchase orders to these agents and manufacturers, and he also had authority to approve the resulting invoices.

Mike almost always acted in respect of purchases; rarely was he involved in sales – with one exception. From time to time, ABC had left-over product from discontinued product lines, and in this situation, it was ABC's practice to "unload" this material by selling it off to liquidation companies. Sammy owned just such a liquidation company and he regularly bought end-of-the line product from ABC and in doing so, his contact at ABC was Mike.

In 2010, Mike's manager learned of some highly suspicious transactions. While Mike had approved for payment certain invoices in respect of copy paper, and had signed the "receiving" slips, acknowledging receipt of this paper, the paper could not be located at ABC's premises. ABC's file copies of the invoices stated that the product was to be "shipped to" ABC. In the course of subsequent investigation, XYZ obtained duplicate copies of the relevant invoices from the manufacturers. These invoices showed that the "ship to" location was Sammy's company. When initially confronted with this information, Mike made various excuses and stonewalled. When confronted with additional information as it became available, he abruptly resigned from the company.

This was all compelling stuff and it appeared that what we had was a phoney invoice scheme where the inside employee manipulated his employer's records so that the employer would pay for product that had been shipped to the outside fraudster company/person. Normally, the employee in such a scenario would profit in one of two ways: (i) either he had an interest in the outside company so that the theft of the paper would provide a benefit to him; or (ii) the outside fraudster would pay kick-backs of some kind to the employee.

It is always easier to prove a fraud and to obtain judgment if you can demonstrate a flow of money from a third party to the dishonest employee. The courts have been clear that any surreptitious dealings between an employee of a company and someone who does business with the company (a "vendor"), represents a fraud on the employer and will

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<sup>1</sup> These case studies are based on real life examples, but are "composite" in nature; meaning, each case study reflects facts from more than one real-life file.





## The Norwich Pharmacal Order: A Primer – cont. from page 3

normally be a breach of fiduciary duty. Similarly, any secret payment made by the vendor to the employee will constitute a “bribe”. There is no defence to these allegations other than the payments were made with full and fair disclosure to the employer: see my case of *Enbridge v. Marinaccio et al* 2011 ONSC 2313 in which we obtained judgment in respect of breach of fiduciary duty and bribery.

We carried out assets searches of Mike and Sammy and found that they owned houses, jointly with their spouses. These houses had sufficient equity to warrant the litigation expense, so we moved for and obtained a Norwich Order. The resulting bank records showed that Sammy made extensive payments to a sole proprietorship registered in Mike’s name. Both that business account and one of Mike’s personal accounts had significant balances which we were subsequently able to freeze. Once we served them with our orders and our claim, both Mike and Sammy protested that they were legitimate business people carrying on a legitimate trade and their business activities were no one’s business but their own. They challenged the legitimacy of our evidence of fraud, and made up excuses to explain away the compelling evidence of fraud. And none of it mattered: once you have the bank records showing the secret payments, there is no defence. It took a while, but eventually we convinced the defence lawyers that Mike and Sammy were “going down” and we settled out. In the *Enbridge* case (referred to above), the lawyers did not accept our arguments and we successfully moved for judgment (and were upheld on appeal).

### 2. Brazen Bruno

In 2011, an anonymous whistle-blower came forward to the XYZ City government and complained that a senior employee, Bruno, was inappropriately involved with one of the City’s paving contractors, Mr. Bitumen, owner and principal of “Bitumen Paving Inc”. The whistle-blower advised that Bruno’s son worked for Bitumen and had the use of one of Bitumen’s pick-up trucks. He advised that Bruno had just bought a new Porsche for himself (which he could not afford on his City salary), and he advised that Bitumen had done some paving work on the driveway, at Bruno’s home. Most importantly, the whistle-blower suggested that Bruno was approving pumped-up invoices.

Bruno’s position with the City was such that the allegations of the whistle-blower were treated very seriously. For one thing, Bruno had complete control over the tender process by which Bitumen had obtained his paving contract for the past 10 years. Bruno was also in charge of inspecting the work done by Bitumen and of approving Bitumen’s invoices.

The City’s paving contractors charge both for their time and for the quantity of asphalt used. The price per tonne of asphalt is one of the items that go into each contractor’s tender bid. On each of his invoices, Bitumen expressly set out, and charged for the quantity of asphalt used on each job.

The City required that asphalt laid by any paving contractor be to a depth of roughly 1.5 inches; i.e. 0.04 metres. This was the industry standard. It is a rough rule of thumb in the paving industry that one metric tonne of standard asphalt covers about 10 square metres of surface area, to a depth of 0.04 metres. Thus, 100 square meters of surface area requires about 10 tonnes of asphalt to cover to a depth of 0.04 metres. This is an approximate value but it makes it easy to review invoices for accuracy; you simply divide the number of square metres by 10 to get the approximate tonnage of asphalt required. Thus, to pave 200 square metres of area, you need roughly 20 tonnes of asphalt, and so on.

As part of its investigation, the City reviewed all of the Bitumen invoices that Bruno had approved over a period of years. It found many instances where the invoices were transparently “pumped-up”, so that, for example, in one case, a Bitumen invoice referred to 80 square metres of surface area, but charged for 25 tonnes of asphalt, when it should have been 8 tonnes. In another case, the invoice referenced 120 square metres of paved area, and Bitumen had charged for 35 tonnes, when it should have been 12. And on, and on. And Bruno had approved these invoices, and he had to know that this was wrong.

Armed with this evidence and with certain surveillance, we jumped into court and obtained a Norwich Order. The results were spectacular!



## The Norwich Pharmacal Order: A Primer – cont. from page 4

First, we found that Bitumen had made payments in the hundreds of thousands of dollars over a ten year period to four separate companies controlled by Bruno or his family members. We had not known about these companies before. For the reasons set out above, this information about the payments was enough for the City to obtain judgment, since the existence of *any* secret payments and of *any* secret business dealings between a company's employee and an external vendor doing business with the company, was irrefutable evidence of breach of fiduciary duty, and of bribery. The only defence for such activities is that the employee and the vendor made full disclosure to the principal. In this case, of course, Bruno and Bitumen had taken active steps to conceal their activities. As soon as I saw the bank statements setting out the payments, I knew we had them.

A finding of liability is one thing, but what about the money? We wanted to prove the quantum of the loss, but we also wanted to locate funds and assets that we could freeze as part of our recovery. Well, before we started our litigation, we had carried out asset searches, so we already knew where Bruno and Bitumen lived, and that they owned these houses with their spouses. We knew that we could freeze those houses and that this would provide some security for the legal costs involved in our obtaining the Norwich Order. However, when we obtained the account statements for the various "Bruno" companies, we found that the current balances in these various accounts totalled to over \$200,000! There was more though. We saw numerous transfers out of these accounts to certain other accounts. When we obtained the details on these other accounts, we found that they were investment accounts, also controlled by Bruno and his family, also with balances in the six figures!

Finally, the account statements revealed a payment to a lawyer which turned out to be a substantial down-payment for the purchase of his daughter's house. When a party can trace stolen money into a house or other real property, the courts will find that such properties are held "in trust" for the victim of the fraud (to the extent of the investment of stolen funds, either on the basis of a charge, or on the basis of a *pro rata* share of the equity, whichever is more advantageous). This is true even if the legal owner of the house had no knowledge of, and was not involved in the fraud (unless that person paid full market value for the property). In the present case, Bruno had provided a \$75,000 gift, of dirty money, to help his daughter buy a house. She was apparently unaware of the fraud, but because she was not a "*bona fide* purchaser for value", in the eyes of the court, she was a "constructive trustee" who was obliged to account to the City for this portion of the stolen money.

In this case, therefore, the Norwich Order provided us with the full proof of wrong-doing on the part of Bruno and Bitumen – the secret payments by Bitumen to Bruno, through the companies – and the quantum of the secret payments was helpful in establishing the total quantum of the loss. The order also enabled us to locate large amounts of funds that were still held in various accounts, and it identified the daughter's house as a further source of recovery (and the daughter as a defendant whom we had to add to our action).

Armed with this information, we jumped back into court and obtained a Mareva injunction, allowing us to freeze the houses and all of the bank and investment accounts. Once we presented all this to Bruno and Bitumen (and Bruno's family members), through their lawyers, they had little choice but to settle out with us, on very favourable terms.

### The Test for A Norwich Order

The Ontario Court of Appeal in *GEA Group AG v. Ventra Group Co.*<sup>1</sup> has recently clarified the test for a Norwich Order, as follows:

- Has the applicant provided evidence sufficient to raise a valid, *bona fide* or reasonable claim?
- Has the applicant established a relationship with the third party from whom the information is sought such that it establishes that the third party is somehow involved in the acts complained of?
- Is the third party the only practicable source of the information available?

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<sup>1</sup> (2009), 96 O.R. (3d) 481



## The Norwich Pharmacal Order: A Primer – cont. from page 5

- Can the third party be indemnified for costs it is exposed to as a result of the disclosure?
- Do the interests of justice favour the obtaining of the disclosure?

The Court of Appeal noted in *GEA Group* that while a Norwich Order is an equitable, discretionary and flexible remedy, it is also an intrusive and extraordinary remedy that must be exercised with caution. The Court of Appeal made it clear that a Norwich Order may be appropriate to allow for pre-action discovery in aid of a Mareva injunction order and/or a tracing situation. As such, where a plaintiff can demonstrate a strong *prima facie* case in fraud, where the fraudster is not yet aware of the plaintiff's recovery efforts, and where it would otherwise be impossible to obtain, for example, the fraudster's bank records (since any request for such records made to the fraudster would necessarily "tip" him off to the underlying recovery action, thereby enabling the fraudster to deplete or hide assets), then it is open to the Court to grant such an Order.

As with any motion made without notice, it is imperative that the moving party make full and fair disclosure in the affidavit materials, and the failure to do so is itself, sufficient grounds for setting aside the Order.

Obviously, a Norwich Order made in the context of an underlying fraud claim would be made on a without notice basis. The courts will often allow that the Order may be kept in force and secret from the fraudster for a period of 60 days, and this period may sometimes be extended.

### Conclusion

A Norwich Order is an extraordinary remedy which can be extremely useful. Before granting such an Order, the courts require well-drafted and careful affidavit evidence setting out essentially a strong *prima facie* case in fraud. For this reason, it can sometimes be somewhat expensive at first instance to obtain such an order (and normally, a litigant would not want to undertake such a venture unless an asset investigation revealed that the fraudsters had at least some assets available for seizure). However, fraud files can often be complicated and messy affairs. Sometimes fraudsters are unrepentant, and if they choose to do so, they can drag out litigation for months or years. Fraudsters will also often try to dissipate assets once they realize that their victims intend to sue for recovery. In the right circumstances, a Norwich Order can provide at a very early stage of the litigation the perfect evidence to prove liability, to identify assets for recovery, and ultimately, to lead to a fast, cost-effective and satisfactory result.








### About the Author:

**Reid Lester** has extensive experience in commercial fraud matters relating to strategic guidance and to recovery claims, including Mareva injunctions, Anton Pillar Orders, and tracing orders. He is currently a Partner at Laishley Reed LLP in Toronto where he practices in the areas of Fidelity Insurance Law, Commercial Fraud, Banking and Bills of Exchange, E & O, and recovery actions of all kinds.





## Coming Events

-  **February 19, 2014 – ACCA – Toronto presents: “Big Data and the Future of Accountancy”**  
**Speaker:** Ewan Willars, Director of Policy for ACCA Global.  
**Venue:** Ivey, Ing Direct Leadership Centre, 130 King St. W., Toronto.  
5:30 pm – 6:15 pm registration & networking.  
6:15 pm – 7:15 pm presentation.  
**To register:** <http://www.acca.memberlodge.org/events?eventId=827091&EventViewMode=EventDetails>
-  **February 20, 2014 – Institute of Internal Auditors – Toronto Chapter presents – Lunch Education Series: “Improving Your Risk Assessment Process for Transformative Results”**  
**Speakers:** Brian Link, VP Strategy, Resolver Inc.  
**Venue:** Albany Club, 91 King Street East, Toronto.  
12:00 pm registration, networking and light lunch.  
12:30 – 2:00 pm presentation and Q&A.  
**To register:**  
<http://www.gifttool.com/registrar/ShowEventDetails?ID=2071&EID=16466>
-  **February 25, 2014 – ACFE Toronto Chapter and ACCA presents : “A Comparison of Civil and Criminal Fraud Proceedings”**  
**Speakers:** Elissa Sinha LL.B., BLG and Detective Constable Chris Devereux, Toronto Police Fraud Unit  
**Venue:** University Club, 380 University Avenue, Toronto.  
5:30 pm – 6:15 pm registration, networking and dinner.  
6:15 pm – 7:15 pm presentation.  
**To register:**  
Members: [https://www.paypal.com/cgi-bin/webscr?cmd=s-xclick&hosted\\_button\\_id=BC7PKT3B3YRGN](https://www.paypal.com/cgi-bin/webscr?cmd=s-xclick&hosted_button_id=BC7PKT3B3YRGN)  
Non-members: [https://www.paypal.com/cgi-bin/webscr?cmd=s-xclick&hosted\\_button\\_id=99SC6HZT8UEG](https://www.paypal.com/cgi-bin/webscr?cmd=s-xclick&hosted_button_id=99SC6HZT8UEG)
-  **February 28, 2014 – Institute of Internal Auditors – Toronto Chapter presents – Full Day Education Event: “Critical Thinking Skills for Auditors”**  
**Speakers:** Drummond Khan M.S., CIA, CGAP, CGFM  
**Venue:** Holiday Inn, 200 Holiday Inn Drive, Cambridge, Ontario.  
Registration And Continental Breakfast: 7:45 a.m. – 8:30 a.m.  
Session Ends: 4:45 p.m.  
8 CPE credits.  
**To register:** <http://www.gifttool.com/registrar/ShowEventDetails?ID=2071&EID=16629>
-  **March 18, 2014 – Institute of Internal Auditors – Toronto Chapter presents – Breakfast Education Series: “Developing and Maintaining Effective Quality Assurance and Improvement Programs”**  
**Speakers:** Beili Wong, Chief Audit Executive at the LCBO and Derek Lo, Senior Audit Manager at TD Bank.  
**Venue:** Albany Club, 91 King Street East, Toronto.  
8:00 – 8:30 am registration, networking and light breakfast.  
8:30 – 10:00 am presentation and Q&A.  
**To register:** <http://www.gifttool.com/registrar/ShowEventDetails?ID=2071&EID=16467>



Ottawa



Edmonton



Calgary



South Western Ontario

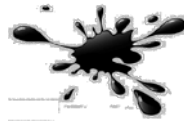


Toronto



Vancouver

# The Blotter



## Details emerge on Comox Valley daycare operator's \$357,000 fraud

In less than 2 years, a Vancouver Island woman effortlessly tricked the B.C. government into handing her \$357,000 for nothing, in an online billing scheme involving several non-existent childcare clubs. [Read more](#)

## Father Joseph LeClair pleads guilty to defrauding church

Father Joseph LeClair, a popular Catholic priest, pleaded guilty Monday to defrauding Ottawa's Blessed Sacrament Church of about \$400,000 over a 5-year period. [Read more](#)

## Corrupt tax auditor gets three years

CRA team leader Jeffrey Granger admitted to helping Peel developers evade taxes while also framing the mayor of Caledon. [Read more](#)

## High-ranking Quebec police charged with fraud

The former head of the Quebec provincial police force is among four former top cops facing fraud, theft and breach of trust charges. [Read more](#)

## Did you know.....

According to the Canadian Anti-Fraud Centre, \$1.5 million has been reported as stolen from Canadian victims over the last two years through money transfer scams. This figure identifies only the amount reported; much more is not reported due to embarrassment.

We should all be familiar with the fraud scheme of transferring money under the guise of a 'mystery shop'; however, the scam has hit the news again.

The scam goes as follows: Fraudsters post a job on the internet, under a fake company name, for mystery shoppers to work for large clients such as Western Union. The individual answering the ad receives a cheque which is to be cashed through their personal bank account and the money used to 'test' the integrity of the system. The individual is to transfer funds to 'fake' names and is told that the funds will not transfer due to an invalid name and that they can then retrieve the money from the unit at the end of the day.

This becomes their payment; however, there is no money to retrieve at the end of the day and the initial cheque provided by the fraudster does not clear the bank and so the victim is responsible for the funds, in the cases in the news, these cheques were up to \$5,000.

[Read more](#)

## About the ACFE:

The ACFE is the world's largest anti-fraud organization and premier provider of anti-fraud training and education. Together with more than 70,000 members, the ACFE is reducing business fraud world-wide and inspiring public confidence in the integrity and objectivity within the profession. Visit [www.acfe.com](http://www.acfe.com) for more details.

“One may outwit another, but not all the others.”

~ Francois de La Rochefoucauld





## Your Board of Directors

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Ryan Watt	<a href="mailto:ryan_watt@can.salvationarmy.org">ryan_watt@can.salvationarmy.org</a>

# February 25, 2014

## “A Comparison to Civil and Criminal Fraud Proceedings”

### Presentation Overview:

An experienced Fraud Litigator and seasoned Police Detective will discuss, compare, and contrast criminal and civil fraud prosecutions from the perspective of the victim. The issues covered will include civil and criminal procedures for the investigation, prosecution, and sanction of fraud, as well as possible outcomes in both forums. The pros and cons of civil and criminal routes will be examined, as well as the factors that influence the timing of pursuing one or both approaches. Attendees will learn how to

**Elissa Sinha, LL.B, Partner** – Borden Ladner Gervais LLP. Elissa was called to the Ontario Bar in 2003 after receiving her B.A. (1999) and LL.B (2002) from Queen’s University. Elissa’s commercial litigation practice incorporates extensive fraud work, including victim recovery proceedings, cheque fraud, mortgage fraud and multi-jurisdictional fraud cases. Elissa has also advised on fraud investigations and liaised with police and law enforcement officials in fraud matters.

Elissa has expertise in the procedural tools required to further a fraud investigation and effectively prosecute a fraud case, such as *Mareva* injunctions, *NorwichPharmaceutical* Orders, *Anton Piller* Orders, setting aside fraudulent conveyances, and disclosure orders. She has represented individual victims, financial institutions, and professionals in fraud cases.

**Detective Constable Chris Devereux** has been with the Toronto Police Service since 1996 and has been assigned to Primary Response, the Criminal Investigation Bureau, the Major Crime Unit and finally the Fraud Unit. He has been in the Fraud Unit since 2006.

His main duties are the investigation of all types of fraud that are reported to 32 Division. He started in the office investigating Bulgarian Organized Crime Mortgage frauds, in which persons were losing their homes. He has completed investigations in millions of loss to a few hundred dollars.



Elissa Sinha



Det. Cst. Chris Devereux