**Fact-Finding in Immigration Detention Reviews: Evidence Law meets Administrative Law**

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**Description:**

Debates over immigration detention have received increased scholarly attention in Canada in recent years. Some key points of contention include whether there should be any immigration detention at all, whether there should be an upper limit on the length of detention, whether children should ever be detained (and if not detained, then separated from detained parents), whether processes for reviewing ongoing detention are fair and appropriate, and what conditions of detention should be like.

One aspect of immigration detention that has not received as much attention is the norms and processes according to which evidence is introduced and assessed in immigration detention reviews conducted by the Immigration and Refugee Board’s Immigration Division. At first glance this may not be entirely surprising. Section 173 of the Immigration and Refugee Protection Act notes that the Immigration Division is “not bound by any legal or technical rules of evidence.”

Meanwhile, Canadian evidence scholarship has been disproportionately concerned with rules of (non-) admissibility. This focus has persisted even though the principal way information is examined in legal processes is not through decisions about admissibility but through decisions about assessments of credibility and how to interpret information. In part, the resultingly distorted picture of the field of evidence is a product of the overwhelming presence of those interested in criminal law (and, therefore, the image of the contested criminal trial) amongst those teaching and writing about evidence – though this focus on admissibility misrepresents some of the key questions regarding the use of information in adversarial criminal processes as well.

In our view, there is much to be gained by considering what evidence law scholarship has to say about administrative law settings, and vice-versa, and we think that the immigration detention context is an especially promising place to bring these two areas of law into further conversation.

Immigration detention raises liberty interests that are in some ways similar to the criminal law context studied by most evidence law scholars. For example, immigration detention reviews involve the government asserting that a person should be detained, the length of detention sometimes extends for many years, and detainees often find themselves co-mingled with general prison populations in provincial institutions. Accordingly, the existing insights of evidence scholarship, so coloured as they have been by the criminal adversarial trial setting, can illuminate issues in the management of information in the immigration detention setting.

At the same time, we think that recent social-legal scholarship in the immigration field also has interesting things to say to evidence law scholars and the study of evidence. Partly because of the scant attention paid to formal rules of evidence in the immigration setting, much immigration law research relating to fact-finding has adopted sociolegal approaches. This research has focused less on rules relating to the admissibility of evidence, and more on examining outcomes in credibility assessments and exploring how adjudicators justify their factual findings. In our view, this research can encourage evidence law scholars to examine similar types of questions about fact-finding in other types of legal processes – and can thus help push evidence law scholarship beyond questions regarding admissibility in criminal trials.

This workshop, which will be cohosted by Osgoode Hall Law School and the Centre for Refugee Studies at York University, aims to help bring evidence law and administrative law into a deeper conversation with one another by examining fact-finding in immigration detention reviews. It will be of interest to evidence law, administrative law, and immigration law scholars – as well as practitioners and decision-makers involved with immigration detention reviews in Canada.

**Schedule:**

**8:30-9:00 – Breakfast & Registration**

**9:00-9:15 – Session 1: Introduction**

*Sean Rehaag*, Welcome & Acknowledgement of Territory

*Benjamin Berger*, Introducing Workshop Themes (10 minutes)

Description: This session will welcome participants to the workshop and will set out some of the key themes that the workshop aims to explore.

**9:15-10:00 – Session 2: A Primer on Immigration Detention**

Chair: *Delphine Nakache*

*Sharry Aiken,* Introducing Immigration Detention in Canada (10 minutes)

*Jamie Liew*, Evidence in the Immigration Division’s New Guidelines (10 minutes)

*Falak Mujtaba & Michael Tunji*, The Impacts of Immigration Detention (10 minutes)

*Rauf Azimov & Souheil Benslimane*: Experiences of Immigration Detention (5 minutes each)

Q & A (10 minutes)

Description: This session aims to provide a basic primer on immigration detention and on recent Guidelines established by the Immigration and Refugee Board, to help ensure that everyone is familiar with the general context.

**10:00-10:15 – Health Break**

**10:15-11:10 – Session 3: Theorizing Fact-Finding: Public Decision-Making and the Law of Evidence**

Chair: *Kate Glover Berger*

Presenter 1: *Emma Cunliffe*, A view from Evidence Law(15 minutes) (by videoconference)

Presenter 2: *Lorne Sossin*, A view from Administrative Law (15 minutes)

Presenter 3: *Audrey Macklin*, A view from Immigration Law (15 minutes)

Q&A (10 minutes)

Description: In his critique of the dominance of the rule-based approach to theorizing the law of evidence, William Twining famously described rules of exclusion as like the Cheshire Cat. They appear unpredictably, partially, and sometimes not at all in the subject that should concern evidence scholars: principles for the management of information in the process of fact-finding. Although Twining was speaking of the litigation process, this critique is amplified when we turn to the diverse administrative settings in which most public decision-making in fact takes place. In those settings, by contrast, evidentiary issues are often simply folded into questions of procedural fairness. Does this adequately capture our concerns about the management of evidence in those settings? How should we think about principles of good fact-finding when we turn away from the criminal trial and towards administrative decision-makers? Taking up the case of immigration detention reviews, this panel engages immigration, administrative, and evidence law scholars on these questions.

**11:10-11:25 – Session 4: Performance and Installation**

 *Swathi Sekhar*, Introduction

*Julie Lassonde*, “Allez vous faire foutre” (10 minutes)

Description: Julie Lassonde is a performance artist and a social justice lawyer. As part of her social justice work she served as a Designated Representative for a Francophone man who has been in immigration detention due to flight risk for more than 5 years, in a maximum-security institution, co-mingled with people serving criminal sentences. He refused to participate in detention reviews during most of that time. In this performance piece, which has been commissioned for this workshop, Julie explores her experience attempting to communicate with the person involved, her experience with the immigration detention review process, and her experience with a habeas corpus application that she brought with legal representation by Swathi Sekhar when multiple immigration detention reviews did not result in release.

**11:25-11:35 – Health Break**

**11:35-12:45 – Session 5: Learning from Evidence Law in Other Canadian Legal Contexts**

 Chair: *Lisa Kerr*

 *TBD,* Bail and Parole (10 minutes)

 *Jamie Cameron*, Ontario Review Board (10 minutes)

 *Lisa Kelly,* Family Law (10 minutes)

 *Senwung Luk*, Aboriginal Law (10 minutes)

*Subodh Bharati,* Habeas Corpus in Immigration Cases (10 minutes)

Small group discussion: 15 minutes

Description: This session examines several different contexts in Canadian law in which important interests are at stake in legal proceedings, but where evidentiary norms may be more relaxed than in criminal trial litigation. This will be followed by small break-out groups discussing what we can learn about evidence in the immigration detention context – and the connections between evidence law and administrative law more generally – from the treatment of evidence in these other areas.

**12:45-1:45 – Lunch**

**1:45-2:20 – Session 6: Evidence in Immigration Detention: A Few Quick Examples**

 *Chair: Representative of IRB Immigration Division* (Confirmed, but individual TBD)

 *Barb Jackman* (5 minutes)

 *Simon Wallace* (5 minutes)

 [CBSA, TBD] (5 minutes)

 *Maria Burgos* (5 minutes)

 Small group discussion: 15 minutes

Description: In this session, a panel of legal professionals with experience in immigration detention reviews will briefly share examples of the sorts of evidence problem that arises in this area. This will be followed by small break-out groups discussing what particular problems tell us about evidence law in this area, and what evidence law may contribute to working through that problem. The session aims to give workshop participants a fuller sense of the types of evidence problems that arise in the Canadian immigration detention context.

**2:20-3:10 – Session 7: Principles for Assessing Sufficiency of Evidence in Immigration Detention Reviews**

 Chair: *Patricia Cochran*

*Hilary Evans Cameron*: Fact-Finding in Immigration Detention (and the Wrong Mistake) (10 minutes)

*Hamish Stewart*, Sufficiency and Management of Evidence in Criminal Cases and Court Settings (10 minutes)

*Asad Kiyani*, Burdens of Proof and Management of Evidence in Immigration Settings (10 minutes)

*Chris Crighton*, Burdens & Presumptions in Immigration Detention: Practical Realities and Protecting Public Interests (10 minutes)

 Q&A (10 minutes)

Description: Principles relating to the sufficiency of evidence – onus, standard, and burdens of proof, and presumptions – are robustly developed in the law of evidence as it concerns litigation and, in particular, the adversarial criminal trial. The burden of proof is, in fact, a touchstone in that setting, driving many of the other rules of procedure and admissibility governing good fact-finding. What is far less clear is the role of questions of the sufficiency of evidence in non-court public decision-making, the province of administrative law. This is in part owing to the powerful myth that formal rules of evidence do not apply in administrative settings; it is in part attributable to the very different forums in which administrative decisions are made (ministers, agencies, and tribunals, etc.). Given its nature, the immigration detention review setting offers a rich example to examine the question of what role burdens of proof, standards of proof and presumptions should play in structuring the approach to the management of information in administrative decision-making.

**3:10-3:25 – Health Break**

**3:25-4:05 – Session 8: Crossing Disciplinary Borders: Learning from Other Disciplines**

Chair: *Michaela Hynie*

*Kelly Hannah-Moffat*, Criminology and Sociolegal Studies: Assessing Risk (10 minutes)

*Todd Baron*, Psychology: Detecting Deception (10 minutes)

*Michaela Beder*, Psychiatry: Impact of Detention on a Detainee’s Ability to Testify (10 minutes)

 Q&A (10 minutes)

Description: This session seeks to draw lessons from research in other disciplines that is relevant to how evidence should be assessed in immigration detention reviews.

**4:05-4:45 – Session 9: Crossing Jurisdictional Borders: Learning from Other States**

Chair: Margaret Boittin

 *Mary Holper*, Evidence in US Immigration Detention (15 minutes)

*Ana Ballesteros Pena*, Evidence in Immigration Detention in Spain (15 minutes)

 Q&A: 10 minutes

Description: This session seeks to draw lessons from how evidence is treated in immigration detention processes in selected jurisdictions outside Canada.

**4:45-5:00 – Health Break**

**5:00-5:30 – Session 10: Beyond Tinkering at the Edges? Abolition or Reform of Immigration Detention**

Chair: *Efrat Arbel*

*Stephanie Sliverman*, De-carcerating the Immigration Enforcement System (10 minutes)

 *Aviva Basman*, Improving Immigration Detention Decision-Making (10 minutes)

 Q&A (10 Minutes)

Discussion: This session will critically consider whether focusing attention on procedural questions, including evidence law, is where efforts should be placed – or whether more radical approaches should be considered.

**5:30-5:45 – Session 11: Conclusion**

*Hilary Evans Cameron:* Announcement of Student Research Poster Prize Winners (6 minutes, including 2 min each for winner and runner up to briefly describe their research)

*Sean Rehaag*: Comments on Workshop Themes (5 min)

*Benjamin Berger:* Next Steps (2 min)

*Stephanie Silverman*: Thank-yous (2 min)

**5:45pm – Post-Workshop Social**

**Workshop Organizers:**

**Benjamin Berger**

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