

# The Use of Phallometric Evidence in Canadian Criminal Law

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The use of phallometric evidence by Canadian criminal courts has steadily increased since the early 1980s. Phallometry was initially considered by courts to be a potentially useful tool in the determination of accused persons' culpability; however, its contemporary use is limited to the postconviction contexts of sentencing and dangerous and long-term offender applications, as one of several means of diagnosing offenders, determining recidivism risk, and assessing treatment prospects. We provide an overview and assessment of the use of phallometric evidence by Canadian criminal courts and conclude that its contemporary application appears to be consistent with the expert psychiatric consensus on its proper role and function in the forensic context. We further identify potential difficulties associated with the adequacy of offenders' consent and the occasional divergence of expert opinion about the reliability and validity of phallometry for diagnosis and risk assessment.

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Phallometry (also known as penile plethysmography) is a technique used in the assessment and treatment of paraphilias in men. In essence, it detects an increase in penile circumference in response to specific visual or auditory stimuli and, on this basis, suggests the nature of the subject's sexual interests.<sup>1</sup> Analogous techniques have been developed to assess women.<sup>2</sup> We note also the recent exploration of functional magnetic resonance imaging to assess sexual interests.<sup>3</sup> Phallometric evidence has been accepted by courts in the United States as a condition of parole, probation, and supervised release; how-

ever, there has been much greater resistance to admitting it at trial.<sup>4</sup>

Although phallometry has now attracted a significant level of acceptance for its utility in the treatment of paraphilias and to some extent in making prospective risk assessments, a much more controversial use has been the reliance on phallometry to draw retrospective conclusions about whether an accused person is guilty of an offense. The Supreme Court of Canada rejected the use of phallometry for this purpose in 2000 in the case of *R. v. J.-L.J.*<sup>5</sup>

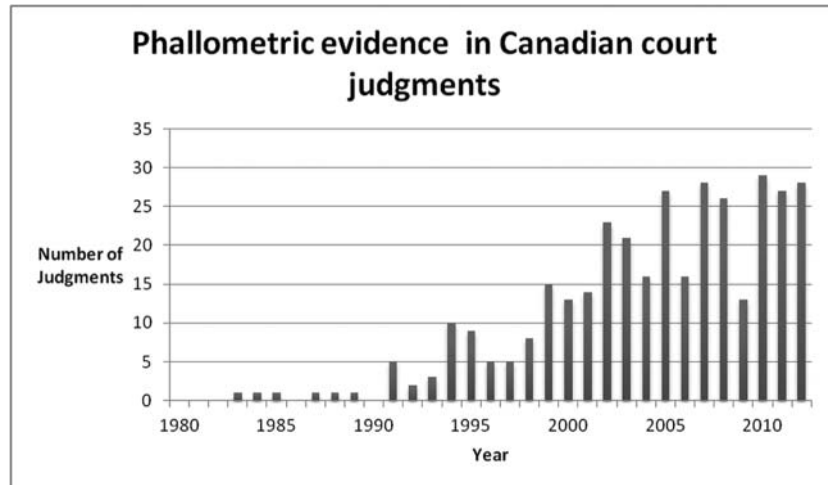
The use of phallometric evidence first appeared in Canadian criminal cases in the 1980s, and references to it have increased substantially, up to a current frequency of 25 to 30 new case references per year. (The frequency of case references is presented graphically in Figure 1.) It is most frequently used by Canadian courts in sentencing convicted offenders, where information about diagnosis, risk of recidivism, and prospects for successful treatment are being considered.

The purpose of this article is to provide an overview of the contexts in which Canadian criminal law is currently using phallometric evidence, as well as to offer a discussion of some potential difficulties in that use. In particular, we comment on whether an of-

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**Figure 1.** Results of the search of the general Canadian legal database (LexisNexis Quicklaw, All Canadian Court Cases<sup>12</sup>). The specific search string was “phallometric or plethysmograph!” The database used includes federal and provincial courts across Canada, but excludes boards and tribunals. The search yielded 397 citations, from which we removed duplicates and incidental references to phallometry unrelated to the use of phallometric evidence in that case (e.g., cases in which phallometric evidence was not at issue, and the reference to phallometry was in the context of the general rules of evidence law discussed in the decision of the Supreme Court of Canada in *R. v. J.-L.J.*,<sup>5</sup> which addressed phallometry).

fender can be said to consent freely to phallometric testing in the forensic context. Second, we note that the literature suggests some divergence between experts on the reliability and validity of phallometry for diagnosis and risk assessment, and this debate sometimes surfaces in the contending expert opinions in court. Given the particular strengths and limitations of phallometry as a forensic tool, it is important that expert testimony clearly explain areas of disagreement among experts and the precise limits on what phallometry is capable of telling a court about diagnosis, prospects for treatment, and risk of recidivism.

### Phallometric Evidence and Its Use in the Assessment of Sex Offenders

Phallometric testing is available across Canada, although there is no central registry of phallometric laboratories. Similarly, there is no standardized set of stimuli in use in Canada. Most laboratories use a combination of conventional adult videotapes, audiotapes of criminal activities (e.g., sexual assault), and photographs of children that have been altered to protect their identities. Most laboratories have run reliability studies, and there is a protocol to test the validity of the gauge for each assessment session. However, reliability studies have never been systematically conducted across sites (different laboratories). Similarly, there are no current standardized stimulus sets in the United States. This deficiency has not proven to be a problem because phallometry is

based on comparing a single subject’s responses to different stimuli within the same session.

Although phallometry is imperfect, there appears to be a consensus that it is currently “the best means of objectively measuring deviant sexual interest” (Ref. 6, p 261), that it is “the most valid measure of sexual preferences currently used in sexological assessments,” (Ref. 7, p 43), and that “many practitioners continue to view [it] as a reliable means of assessing deviant sexual interests” (Ref. 6, p 261). On the other hand, others caution that “there continues to be a great deal of controversy about the use of [phallometry] in correctional assessments . . . [and] that the main problem is the lack of a sound empirical basis” (Ref. 1, p 242). Nevertheless, the inherent limitations of diagnosing paraphilias according to an offender’s self-reported interests (particularly in the context of accusations of sexual offending where an offender may wish to deny such interests) may make phallometry particularly useful (Ref. 8, p 682).

Among the critiques of phallometry in the context of forensic risk assessment are concerns about its ability to detect paraphilic sexual arousal and the validity of the linkage between paraphilic sexual arousal patterns and criminal behavior.

On the first point, some of the suggested problems involved in using phallometry to detect paraphilic sexual arousal are deliberate response manipulation, inadequate response magnitude that is not necessarily due to deliberate manipulation (e.g., due to

anxiety, vascular disease, or neurological factors), and inadequacies in the stimuli presented to test subjects, among other concerns.<sup>1,8</sup> It appears that sex offenders who deny paraphilic sexual interests fairly often have normal arousal patterns. This may be because they are able to suppress their responses in phallometric testing, because they actually do have normal arousal patterns but have committed sexual offenses nonetheless,<sup>1</sup> or because they do have normal arousal patterns, did not commit sexual offenses, and were wrongly convicted. Finally, the possibility of false-positive results is rarely considered.

On the second point, the strength of the apparent correlation between paraphilic sexual arousal and future sexual offending can also be questioned. Certainly, some people who show paraphilic sexual arousal patterns do not act on them, and some sex offenders do not show such patterns.<sup>1,8</sup> Although paraphilic sexual arousal as demonstrated by phallometry appears to correlate with future sexual offending, particularly for pedophilia,<sup>1</sup> it is, of course, not perfectly predictive. In addition, the strength of the reported correlation is the subject of some dispute.<sup>9</sup> It is worth noting that the Sex Offender Risk Appraisal Guide (SORAG), an actuarial risk assessment tool, attributes only one point (of a maximum of 51) to a deviant phallometric response.<sup>10</sup> The Static-99R is currently the best validated and reliable actuarial scale developed to assist in estimating risk of sexual recidivism. However, neither the Static-99R nor its updated version the Static-2002R includes any items related to phallometric test results.<sup>11</sup> This is probably because the authors of the test set out to create a brief scale that could be rated by assessors who did not have access to phallometry (as is often the case in the United States).

### Phallometric Evidence in Canadian Courts

Phallometric evidence is mentioned in a range of contexts in Canadian courts and tribunals starting in the early 1980s. A search of a general legal database (LexisNexis Quicklaw, All Canadian Court Cases)<sup>12</sup> revealed 349 distinct court decisions between 1983 (the first reference) and the end of 2012 that made some reference to phallometric evidence. These cases are plotted in Figure 1 and reveal the increasing frequency with which phallometric evidence is mentioned in court cases over this period. Since not all

court rulings generate written judgments, phallometry is likely to have played a role in additional cases that are not included here. However, this search provides an indication of general trends, as well as the prevalence of phallometric evidence within written judgments emanating from Canadian courts. In some cases, there are several decisions pertaining to the same individual, where multiple stages in a proceeding have generated separate written decisions. Most of the cases emerge from criminal prosecutions. A smaller number of cases involve family law disputes relating to child custody and access and child protection proceedings. A very small number of other kinds of proceedings are also represented, including professional disciplinary proceedings and civil actions for damages in which phallometric evidence is mentioned.

Although we do not address the use of phallometry within Canadian boards and tribunals in this article, it is frequently mentioned within decisions of several of these types of adjudicative bodies. For example, phallometric evidence is commonly mentioned in the decisions of the provincial Review Boards (the bodies charged under the Criminal Code with reviewing the dispositions of persons found not criminally responsible by reason of mental disorder). Other boards and tribunals in which phallometric evidence has been presented include the Canadian Immigration and Refugee Board, various boards concerned with disciplining professional misconduct within medical and teaching professions, and, occasionally, the Consent and Capacity Board (in relation to hospitalization under mental health legislation). We are also unable to report on the role phallometric evidence plays in the criminal context of parole decision-making. A database of the decisions of the Parole Board of Canada is not searchable by the public.<sup>13</sup>

In the rest of this article, we restrict our review to the use of phallometry in the criminal context. We divide our consideration of the use of phallometric evidence in criminal proceedings into three subsections, each of which involves different legal questions: the finding of guilt, sentencing, and dangerous and long-term offender applications.

### The Finding of Guilt

The question of whether phallometry could be used as evidence at trial to support or undermine a

finding of guilt appears to have been controversial from the early days of the use of phallometric evidence in Canada. In the early case of *R. v. Makarenko*,<sup>14</sup> the defense expert testified that the offense in question was likely to have been committed by someone fitting the arousal profile typical of “sexual aggressives” and that the accused did not have that arousal profile. The Crown expert challenged this testimony on the ground that the supposedly typical arousal profile was obtained from admitted offenders and could not be generalized to “nonadmitters,” who may have nondistinctive arousal patterns on phallometric testing. The court accepted the idea that sexual aggressives were an identifiable group with distinct characteristics and that the defense expert thought that the accused did not have those characteristics, but felt that the evidence was not sufficiently reliable to conclude that the accused had not committed the offense charged. Indeed, the accused was found guilty beyond a reasonable doubt on the basis of other evidence.

This use of phallometric evidence to exclude an accused from the pool of likely offenders on the basis that his arousal pattern differed from the profile thought most likely to be associated with the offense charged was later rejected by the Supreme Court of Canada in 2000 in the case of *R. v. J.-L.J.*<sup>5</sup>

In *J.-L.J.*, the accused was charged with the sexual assaults of two young boys in his care. The defense sought to admit expert evidence that the offenses must have been committed by a person with a highly distinctive personality disorder (said to be identifiable using a general personality test and phallometric testing) and that the accused did not fit the profile. The Supreme Court described phallometry as the “more controversial test” of the two components.<sup>5</sup> The issue on appeal was whether the trial judge properly refused this evidence.

The Supreme Court first noted that phallometry was generally accepted for the purpose of assessing the progress in therapy of people with known and admitted sexual disorders, but its use as a forensic tool to establish whether an accused committed an offense was not.<sup>5</sup> The Court went on to consider whether the defense’s proposed use of phallometric evidence was admissible.

The Supreme Court accepted the idea that, in some cases, an offense may be such that it could only, or in all probability would only, be committed by a person with an identifiable and highly distinctive set

of traits. If this were the case, then evidence of whether an accused did or did not fit that profile might be admissible (Ref. 5, ¶¶ 38–45). However, in *J.-L.J.*’s case, the Court did not feel that there was a sufficiently distinctive profile for who might have committed the particular assaults. Furthermore, the Supreme Court was concerned that the high false-negative rate (i.e., failure to detect deviant sexual interests) would “render the test so prone to error as not to be useful for purposes of identification or exclusion” (Ref. 5, ¶¶ 51, 55). Although they did not endorse the use of phallometric evidence at trial for these purposes, Graham D. Glancy and John M. W. Bradford<sup>15</sup> suggested that the Court’s analysis was hampered by poor presentation of evidence about the procedure.

Since the Supreme Court’s 2000 decision in *J.-L.J.*, phallometric evidence has not been employed by criminal courts to assist in determining an accused person’s guilt, despite several attempts to introduce it for that purpose.<sup>16–18</sup>

## Sentencing

### Introduction

Phallometric evidence is often mentioned in the course of sentencing after a determination of guilt by way of a trial or guilty plea. The Canadian Criminal Code indicates that the fundamental purpose of sentencing is to promote respect for the law and to maintain a “just, peaceful and safe society” through sanctions that have one or more of the following objectives: denunciation of unlawful conduct, general and specific deterrence, incapacitation of the offender, rehabilitation of the offender, provision of reparations to victims or the community, and promotion of a sense of responsibility in offenders and acknowledgment of harm done (Ref. 19, § 718(a) to (f)). In addition to these purposes, the Code indicates certain overarching principles applicable to sentencing. The fundamental principle is that of proportionality, meaning that the sentence should be proportionate to the gravity of the offense and the degree of responsibility of the offender (Ref. 19, § 718.1). Numerous aggravating and mitigating factors may be submitted as relevant to selecting a proportionate sentence that achieves the goals of sentencing.

Generally speaking, Canadian courts use phallometric evidence at the stage of criminal sentencing chiefly in relation to risk assessment and prospects for rehabilitation. It is not just the results of the phallo-



metric test that are treated as relevant by the courts, but also the offender's willingness or refusal to undergo phallometric testing. The cooperation or lack of cooperation is sometimes interpreted to signal that the offender has taken responsibility or is showing remorse. It may also be interpreted as relevant to whether an offender is likely to accept and be successful in rehabilitative treatment.

At the sentencing hearing, the court will receive submissions of both the Crown and the defense regarding the appropriate sentence. The Criminal Code of Canada allows the court to order a presentence report prepared by a probation officer that covers the offender's "age, maturity, character, behavior, attitude and willingness to make amends"; history of previous offenses; and history of alternative measures used to deal with the offender and their effect (Ref. 19, § 721). The Code empowers the judge, after hearing argument from both Crown and defense, to order other matters to be addressed in the presentence report (Ref. 19, § 721.4). In addition, the defense may decide to obtain a psychiatric assessment for purposes of sentencing. The Criminal Code does not empower the court to order such an assessment at the request of the prosecution or on the court's own motion, although such a power is provided at other stages of the criminal process. There is some uncertainty in Canadian law on this point,<sup>20</sup> but it appears that some courts have found their way around the inability to order an assessment for sentencing by instead ordering a sexual behavior assessment under the authority of their general power to order a presentence report. For example, in *R. v. A.C.*, the court directed that a sexual behavior assessment be included in the presentence report, although the offender was entitled to decline to participate.<sup>21</sup> The Code (Ref. 19, § 721(4)) allows the court to direct that, in addition to the contents enumerated in the Code, the presentence report contain "other information." Section 723(3) may also allow for psychiatric evidence, since this section allows a court to "require the production of evidence that would assist it in determining the appropriate sentence."

#### *The Reaction of Canadian Courts to Phallometric Evidence at the Sentencing Stage*

A review of Canadian cases reveals that phallometric results are introduced to the court through a variety of types of written medical reports,<sup>22,23</sup> psychosexual as-

sessments,<sup>24</sup> sexual behavior assessments,<sup>25–28</sup> or *viva voce* evidence offered by an expert.<sup>24</sup> Phallometric evidence is often provided, along with the results of several types of tests, including clinical and actuarial risk assessments.<sup>29–33</sup>

The utility of phallometry as an objective diagnostic and assessment tool is accepted by Canadian courts during sentencing. Courts sometimes make specific reference to whether phallometric test results were used to form the expert's opinion<sup>34–37</sup> and, in some instances, are warned by experts that the absence of these results limits the value of the risk assessment.<sup>34</sup> In *R. v. Meikle*,<sup>38</sup> the court placed "no weight" on an expert's opinion about an offender's risk of reoffending where the expert had not seen fit to conduct any "personality, phallometric or any other tests." Courts may explicitly prefer phallometric results to evidence based on self-reporting by the offender about his sexual interests.<sup>39</sup>

The degree of reliance on phallometric results within the overall expert assessment and within the court's reasoning about the appropriate sentence is variable. Although most cases contain relatively brief references to phallometric test results, courts occasionally include lengthy summaries of expert evidence on the nature and forensic utility of phallometric evidence. For example, in *R. v. Maxwell*,<sup>40</sup> the court addresses at length the interpretation of inconclusive or negative phallometric test results and the deliberate suppression or manipulation of responses during the testing:

The evidence before me establishes that phallometric testing is designed to avoid false positives on deviant sexual interests. I was told that if 100 men who had confessed to maximal sexual interest in young children took the test, only about 55 would register as pedophiles. Even where phallometric testing does not show a positive result for any group of possible sexual partners, it is often possible, as in the case at bar, to look at how a person has expressed himself sexually over the years, and to identify his area or areas of primary interest [Ref. 40, ¶ 43].

In another fairly detailed discussion of the phallometric evidence, the court in *R. v. K.O.*<sup>41</sup> noted the expert testimony that phallometric testing is not a standardized practice "so that a person diagnosed with a certain condition in lab A would not get the same diagnosis in lab B" (Ref. 41, ¶ 95), that the offender's various inconsistent phallometric test results were difficult to interpret and might indicate deliberate manipulation of the test outcomes, and that the attempt to sort this out was "the art rather

than the science of phallometric testing” (Ref. 41, ¶ 134).

As phallometric results may be incorporated into several expert opinions expressed throughout the course of a sentencing hearing, a court’s discussion of phallometry may be lengthy, complex, and, in the event of contrasting expert opinions, at odds. In *R v. Byers*,<sup>42</sup> for example, several experts provided sometimes conflicting opinions about several aspects of a dangerous-offender application, such as the proper interpretation of negative phallometric results in assessing sexual sadism (Ref. 42, ¶¶ 133–8, 191–2). Variation among experts is suggested also by the fact that phallometry is used by some experts to assess paraphilias that do not involve pedophilia (such as sexual sadism<sup>43</sup>), whereas in *R v. S.S.* the expert declined to use it, “arguing that it would have limited utility since this was not a ‘child molesting’ case” (Ref. 44, ¶ 11).

In *R v. R.F.L.*, the court engaged in a lengthy analysis of phallometry with a focus on methodology (Ref. 45, ¶ 218) and accuracy rates (Ref. 45, ¶¶ 188–9). The court in *R.F.L.* also quoted one expert to the effect that “the penis never lies” (Ref. 45, ¶ 183). In that case, the court understood that expert’s opinion to be that “there is no better indicator of recidivism risk for sexual re-offenders than phallometric testing” (Ref. 45, ¶ 183). The expert did go on, however, to caution that negative results cannot be interpreted as excluding deviant sexual interests (Ref. 45, ¶¶ 188–9). Similar warnings have been expressed about the value of negative results in other cases, such as *R v. Smith*,<sup>46</sup> where an expert observed that “. . . there is actually no predictive value to a non-deviant test because we set the bar quite high for a diagnosis of deviance so that we do not erroneously label people as sexually deviant” (Ref. 46, ¶ 68). Another expert noted that:

[phallometric testing is] a laboratory evaluation, so really the results could also be rephrased as that this individual did not show evidence of a coercive sexual preference in a laboratory setting. Many men are intimidated by a contraption strapped to their penis, which might inhibit sexual arousal . . . [Ref. 46, ¶ 68].

Courts may also incorporate expert opinion evidence related to the offender’s perceived behavior while taking a test, such as suspected response suppression. The court in *R v. Miller*,<sup>47</sup> for example, noted that an expert’s diagnosis of pedophilia or hebephilia was reached despite negative phallometric test results, as those results were suspect, given Mill-

er’s apparent “attempt to suppress penile responses to certain visual stimuli.” Possible response suppression and its effect on the diagnosis was listed by the court among the aggravating factors to be reflected in the sentence imposed (Ref. 47, ¶ 13).

Some experts may be unwilling to express an unqualified diagnosis without the objective verification provided by phallometric testing.<sup>48,49</sup> For example, after providing a written conclusion that the offender “meets the diagnostic criteria for non-exclusive pedophilia or incest,” the expert in *R v. C.D.S.*<sup>50</sup> further stated that he was “uncomfortable with this diagnosis without employing the use of an objective measure of sexual arousal such as a penile plethysmograph or an ABEL assessment” (Ref. 50, ¶¶ 9–11). In other cases, the courts did not report reservations by the experts in other cases where phallometric evidence was unavailable.<sup>51,52</sup> Phallometry is not part of Diagnostic and Statistical Manual of Mental Disorders (DSM) criteria for any paraphilic disorder.

Although phallometric evidence is generally introduced in court for the purposes of diagnosis, risk assessment, and evaluating the prospects for rehabilitative treatment, the court may also make adverse or favorable inferences from the offender’s past or present willingness to participate in phallometric testing.

The refusal to participate in the testing may concern some courts (Ref. 53, ¶ 33), despite other courts’ classification of the “failure to seek treatment or counseling” as a “neutral factor” (Ref. 54, ¶ 63). A refusal to participate in phallometric testing may lead the court to question the offender’s potential for rehabilitation, which in turn invites concerns about the protection of the public. For example, in *R v. S.B.*, the court noted that “by his refusal to undergo phallometric testing in the face of his stated desire to have treatment [the offender] has shown himself unwilling to allow the assessment to be based on the fullest possible information about his mental state,” and further that his refusal of phallometric testing and his tendency to deflect responsibility to others was troubling, as it suggested there would be a “long treatment path that Mr. S.B. must undertake to ensure he never commits these kinds of offenses again” (Ref. 55, ¶¶ 33–4).

Similarly, an offender’s behavior during a phallometric assessment may be interpreted by the court as demonstrative of his character and general attitude toward treatment. The court in *R v. Wood*, for ex-

ample, was concerned by the expert's observation that the offender looked away from all the sexually neutral photographs during phallometric testing, which it regarded as an attempt to manipulate his physicians, and went on to conclude that the offenses were the product of a deeply ingrained character trait.<sup>56</sup>

Conversely, an offender's willingness to undergo phallometric testing may serve as a mitigating factor.<sup>57</sup> In *R. v. W.C.C.*,<sup>58</sup> the court listed several mitigating factors, one of which was that the offender "underwent professional assessment . . . that included phallometric testing" (Ref. 58, ¶ 29). An offender's participation in phallometric testing, rather than the actual test results, may favorably influence a court's judgment of an offender's general attitude, remorse, and motivation to address his problems.<sup>59-61</sup> For example, in *R. v. Palacios*, the court noted that the offender's cooperation with the assessment process along with his confession suggested "genuine remorse" and a "genuine willingness to properly address his psychiatric illness so he never engages in sexually inappropriate acts again" (Ref. 60, ¶ 73). In *R. v. Mallett*<sup>61</sup> the court twice noted approvingly that the offender had taken the initiative prior to sentencing to obtain an assessment, including phallometry, at his own expense (Ref. 61, ¶¶ 10, 18). In *R. v. Warn*,<sup>62</sup> the offender's significant commitment to treatment was viewed highly favorably by the court, which noted that "[al]though two psychologists who testified on his behalf at court think he does not need phallometric testing or a treatment program specifically directed to sexual deviance, Mr. Warn himself is prepared to participate in such testing and such a program if required" (Ref. 62, ¶ 29).

#### Phallometry and Probation Orders

In some cases, a court may impose a period of probation as part of a criminal sentence (Ref. 19, § 731). A range of orders or conditions may be included in a probation order. The Criminal Code provides that treatment-related orders may be included if the offender consents<sup>63</sup> (Ref. 19, § 732.1(2)(g)). It appears that some courts draw a distinction between counseling, which may not require consent, and treatment programs of a more invasive medical nature that do require consent.<sup>64</sup>

The types of treatment-related orders included in probation orders in the context of sexual offenses vary. Canadian courts sometimes refer generally to

assessment, counseling, and treatment and occasionally make explicit reference to phallometry within a probation order. Despite the consent requirement for treatment-related conditions, some probation orders contain such a requirement, sometimes including phallometric testing, without mentioning whether the offender consented to this term.

The 2008 decision in *R. v. Ching*<sup>65</sup> is an example of a treatment condition that provided the offender with the discretion to determine the extent of his participation in phallometric testing. Among others, the sentencing judge imposed the following condition:

You shall attend, participate in and successfully complete any assessment, counselling or program as directed by your supervisor. Without limiting the generality of this condition, such assessment, counselling or program may relate to sexual offence prevention, and may include a penile plethysmograph with your consent [Ref. 65, ¶ 59].

A similar condition was imposed in *R. v. D.T.G.*, in which the offender was ordered to "co-operate fully with all recommended assessments, counseling and treatment," followed by the proviso that phallometric testing would not be included unless either the offender consented or there was a court order (Ref. 66, ¶ 64).

Other courts appear to require offenders to remain open and receptive to assessment and treatment without explicitly mandating their participation in a particular procedure such as phallometric testing. In *R. v. Fries*, the court ordered the offender to "be amenable to assessment from the Centre of Addiction and Mental Health Sexology Clinic including the provision of phallometric testing" (Ref. 67, ¶ 35). It is unclear from the wording of this condition whether being "amenable" to phallometric testing would require an offender to contemplate or actually participate in the testing to comply with the order imposed by the court.

In contrast to the ambiguity of *Fries* or the option provided in *Ching*, the most frequently imposed condition is explicit and unequivocal in its direction to the offender. The court in *R. v. Brown*,<sup>68</sup> for example, ordered the offender to ". . . undergo any assessment, treatment or counselling directed by the probation officer or designate, including but not limited to sexual behaviors risk and phallometric testing, and he is not to discontinue such assessment, treatment or counselling without the express consent of the probation officer or designate (Ref. 68, ¶ 118).

Similar conditions have been imposed by the courts in several cases,<sup>53,69–73</sup> including, for example, *R. v. Alcorn*,<sup>74</sup> wherein the offender was directed to “actively participate in, to the satisfaction of his probation officer, any assessment, treatment or counseling as required by his probation officer. Such programming may include but is not limited to phallometric testing and sex offender specific therapy” (Ref. 74, ¶ 39). The offender was further ordered to “sign whatever consents or releases that may be required by his probation officer to monitor and verify compliance with said assessment, treatment or counseling, and provide written proof of completion of said assessment treatment or counseling to his probation officer” (Ref. 74, ¶ 39).

It remains unclear whether offenders who are ordered by courts to undergo phallometric testing have provided prior consent during the sentencing hearing, and this is simply not mentioned in the resulting judicial order. In rare cases, courts refer explicitly to an offender’s prior consent.<sup>62</sup> It is possible that treatment orders may sometimes be made without explicit offender consent. For example, in *R. v. Nicholls*,<sup>75</sup> the offender attempted to defend against a charge that he had breached the term of his probation order requiring him to attend for a psychiatric assessment and counseling as recommended by his probation officer. One argument advanced in that case was that the original order was unlawful as the offender had not consented to it.

#### *Phallometric Evidence and Conditional Sentences*

The Criminal Code allows for the imposition of a “conditional sentence of imprisonment,” in some situations. In these cases, the offender is ordered to serve a sentence in the community subject to conditions. The Code allows the court to include a condition requiring an offender to take treatment. Unlike the Code provision that has to do with treatment conditions within probation orders, there is no requirement that the offender consent to a treatment condition within a conditional sentence of imprisonment (Ref. 19, § 742.3(2)(e)), although some suggest that compulsory psychiatric treatment may be unconstitutional in this context.<sup>76</sup> There are, accordingly, examples of counseling and treatment orders in the context of sexual offenses that require offenders to attend for such treatment as is recommended by the conditional sentence supervisor and medical treatment team.<sup>77,78</sup>

#### *Recommendations to Correctional Authorities*

Occasionally during sentencing, a court makes recommendations directed at the correctional authorities. For example, the court in *R. v. Blatchley* recommended that “phallometric and risk assessment be done during the classification process in the penitentiary” (Ref. 79, ¶ 28). Similarly, in *R. v. Kydyk*, the court recommended that the offender “receive assessment, including phallometric testing and treatment for sexual dysfunction while incarcerated.” The court in *Kydyk* also requested that correctional staff be provided with a copy of an expert’s report, so that it could be used by correctional staff in determining the offender’s placement and treatment (Ref. 80, ¶ 22).

#### *Phallometry in Young Offenders*

Rarely, phallometric evidence is mentioned in cases involving young offenders.<sup>81</sup> In 2010, civil liberties groups in British Columbia expressed concern about the use of phallometric testing in young offenders. Their protests caused British Columbia to suspend the practice<sup>82</sup> and led also to a 2011 report by the British Columbia Children’s Representative recommending against its use in youth.<sup>83</sup>

#### ***Dangerous and Long-Term Offender Applications***

The Criminal Code allows a court to designate certain offenders as dangerous when they have committed one of a list of serious personal injury offenses (including sexual assault) and have been found to pose a risk of future injury to others (Ref. 19, § 753(1)). Dangerous offenders may be sentenced for an indeterminate period of detention or a period of up to 10 years of supervision in the community following the completion of their sentences (Ref. 19, § 753(4)). The designation of “long-term offender” is available for an expanded set of offenses where the court finds there is a risk of future injury to others, and there is a reasonable possibility of controlling that risk in the community (Ref. 19, § 753.1). Long-term offenders may also be sentenced to long-term supervision orders (Ref. 19, § 753.1(3)). The Crown must advise the court of its intention to apply to have the offender designated a dangerous or long-term offender before a sentence is imposed (Ref. 19, § 752.01). The court may grant an assessment order to inform the decision, which al-



lows for an expert psychiatric assessment that may include phallometric testing (Ref. 19, § 752.1(2)).

In Canada, the majority of offenders found to be dangerous (75%) and long-term (68.1%) are individuals who have a current conviction for a sexual offense.<sup>84</sup> Phallometric evidence is routinely mentioned in these dangerous and long-term offender applications and, in some cases, may serve as a significant factor in the decision.

Both current and historic<sup>85–88</sup> phallometric test results are mentioned by expert witnesses in identifying sexual interests, as well as in assessing the future risk associated with the subject of an application. Expert witnesses may refer to phallometric test results obtained under their own supervision, another's supervision,<sup>89,90</sup> or both.<sup>91</sup> Sometimes, courts issue recommendations to the Parole Board of Canada (formerly the National Parole Board) to suggest that phallometric testing be used as part of a future community-based long-term offender treatment program.<sup>92–94</sup>

The reliability and interpretation of phallometric test results are disputed on occasion by both the defense and experts in dangerous and long-term offender cases. The accuracy of phallometric test results was recently challenged by the defense in *R. v. R.F.L.*,<sup>45</sup> which claimed that the person administering the test improperly affected the results by being unfair and unprofessional. The court found the phallometric test administrator's testimony to be both credible and reliable and ultimately dismissed the defense challenge as a "nonsensical fabrication" (Ref. 45, ¶ 223).

The interpretation of phallometric results may also be a source of contention among experts. In *Radcliffe*, there was some disagreement in the expert evidence before the court regarding the interpretation of an "improvement" shown by an offender's phallometric results (Ref. 95, ¶ 126). Likewise, in *Maxwell*,<sup>40</sup> two experts disagreed on the interpretation of nondeviant phallometric test results and in particular whether phallometric test results could show that an offender was capable of a sexual relationship with adult females. Despite the occasional debate among experts regarding the proper interpretation of phallometric evidence, however, test results remain a common component of expert diagnoses and estimations of risk in dangerous and long-term offender cases.

An offender's cooperation with assessment and treatment is usually very important in dangerous and long-term offender cases. A court may not sentence a person to indeterminate detention if there is a reasonable prospect for control in the community of the offender's risk of recidivism—for example, through a long-term supervision order.<sup>96</sup> Demonstrated cooperation with assessment and treatment may suggest this is the case, whereas lack of engagement with rehabilitative treatment may suggest the contrary.<sup>97–99</sup>

In some cases, an offender's refusal to undergo phallometric testing is mentioned in the general discussion of whether there is a reasonable possibility of control of the offender's risk in the community. In *R. v. Hogg*, the Ontario Court of Appeal observed that the offender's rejection of phallometric testing was "consistent with [his] refusal to acknowledge any possible deviance in his history of sexual attacks," before endorsing the trial judge's decision to designate him as a dangerous offender subject to an indeterminate sentence (Ref. 100, ¶ 45). Similarly, in *R. v. P.G.*<sup>97</sup> the offender's refusal to participate in phallometric testing was mentioned as part of his general lack of interest in treatment and failure to acknowledge the underlying condition leading to his offending behavior. As a result, the court granted the dangerous offender application and imposed an indeterminate sentence because there was no reasonable possibility of successful treatment and risk control.

Conversely, the willingness of an offender to consent to phallometric testing may be considered by the court as demonstrating the offender's motivation and amenability to treatment. In *R. v. Smith*, the court noted that "[a]nother indication that Mr. Smith is now more motivated and amenable to treatment is the fact that he consented to phallometric testing and indicated a willingness to take chemical castration drugs" (Ref. 46, ¶¶ 144, 147). The courts have mentioned the willingness to accept phallometric testing and cooperation with psychiatrists in other cases, where this appears to be interpreted as suggesting that there are reasonable prospects for risk control in the community using a long-term supervision order.<sup>101,102</sup>

#### *Judicial Recommendations to Correctional Authorities*

The Criminal Code allows a court to sentence dangerous and long-term offenders for the crime for

which they have been convicted, along with an order of up to 10 years of a long-term supervision in the community (Ref. 19, §§ 753(4), 753.1(3)). This supervision takes place according to the Corrections and Conditional Release Act, which provides that the Parole Board of Canada may establish the conditions for the supervision “that it considers reasonable and necessary in order to protect society and to facilitate the successful reintegration into society of the offender”<sup>103</sup> (Ref. 19, §753.2(1)). This may include orders that an offender take treatment as prescribed by a physician.<sup>104,105</sup>

Courts may offer recommendations as to the terms of supervision within their sentencing judgments,<sup>105</sup> and these recommendations may refer to treatment and to phallometric testing more specifically. For example, in *R. v. R.B.P.*, the court recommended to the parole board that, upon the offender’s release, he undergo phallometric testing to help determine whether he “would benefit from taking sex-drive reducing medication” (Ref. 92, ¶ 116). In *R. v. Lalo*, the court recommended that the offender have phallometric and hormone level tests “as required to assess the impact of the pharmacological treatment administered” (Ref. 93, ¶ 129). In *R. v. W.A.H.*,<sup>94</sup> the court made the more general recommendation that the offender be “subject to regular phallometric testing as scheduled by the Board” (Ref. 94, ¶ 52). The Parole Board of Canada will not require an offender to take a particular treatment, but may direct that he take treatment as recommended by his physician.<sup>42,106</sup>

## Discussion

The courts do not appear to have been using phallometric evidence at the stage of determining an accused person’s guilt since the Supreme Court of Canada’s decision in *J.-L.J.*<sup>5</sup> This is consistent with an apparent consensus among forensic psychiatric experts that phallometric test results should not be used for this purpose.<sup>1,107</sup>

We raise two concerns that we feel warrant further reflection. The first question relates to the adequacy of an offender’s consent to phallometric testing. As noted above, an offender’s cooperation with assessment and treatment has a considerable impact on a court’s judgment of the likelihood for successful treatment. This cooperation or resistance appears to affect a court’s judgment in several ways. A court will

make inferences about an offender’s insight into his difficulties, and greater insight suggests to the court that there are improved prospects for risk control. Courts also make inferences from an offender’s cooperation about an offender’s level of remorse and willingness to take responsibility, both of which are also interpreted as favorable signs for future risk control. Since public safety, the promotion of rehabilitation, and the encouragement of offenders to take responsibility are all relevant considerations at sentencing, an offender may feel some pressure to consent to assessment methods such as phallometry. In addition, more direct pressure may be exerted by ordering an offender to submit to treatment recommended by a physician (possibly including phallometric testing) as a term of a conditional sentence or a long-term supervision order (neither of which requires an offender to consent).

The physician who is treating offenders subject to such orders will seek informed consent from the offender for phallometric testing and other elements of the proposed treatment, pursuant to medical ethics obligations. However, this is a delicate matter, given that an offender who refuses the treatment recommended by his physician is exposed to potentially serious legal sanctions. Whether it is appropriate and legitimate for a legal system to coerce a convicted offender to consent to treatment is a separate question from that of the professional ethics-related obligations of physicians. Harlow and Scott highlighted this question in their brief of *U.S. v. Weber*, 451 F.3d 552 (9th Cir. 2006): “Mandatory penile plethysmography to gain supervised release places the convicted sex offender in the paradox of abrogating his right to personal dignity to secure his release from prison.”<sup>108</sup> We did not address this question, which raises points related to the philosophy of criminal punishment and to the limits placed on that punishment by constitutional human rights considerations. However, it is worth noting that Canadian courts have ruled that a convicted sex offender’s constitutional rights are not infringed where he is obliged to accept antilibidinal drugs as a term of a long-term supervision order.<sup>104</sup> The more modest degree of risk and bodily invasiveness of phallometric testing suggests that it, too, could reasonably be required of a convicted sex offender in the context of a long-term supervision order.

We also raise a concern about the variation within the forensic psychiatric community on the

interpretation of phallometric test results and on the strength of their predictive value with respect to recidivism.

Canadian courts have indicated that some of the rules on the admissibility of evidence are more relaxed at sentencing than at trial, in recognition of the need to obtain the fullest possible information about the accused in determining a fit sentence.<sup>109</sup> However, this ought not to permit the use of expert evidence that does not meet the threshold of reliability required for expert evidence. Recall that in *J.-L.J.*,<sup>5</sup> the Supreme Court rejected as unreliable the idea that there was a phallometric arousal profile typical of the likely perpetrator of a sexual assault against children. However, phallometric evidence is incorporated as a factor within prospective risk assessment at sentencing, implicitly saying that there is an association between certain arousal profiles and future sexual offending. An attempt to avoid the use of phallometric evidence to make prospective risk assessments on the basis of *J.-L.J.* was unsuccessful. In *R. v. Pike*,<sup>110</sup> an offender argued that phallometric test results were inadmissible in a dangerous offender sentencing hearing because this type of evidence had been ruled inadmissible by the Supreme Court in *J.-L.J.* The Court of Appeal rejected this argument, noting that phallometric evidence is routinely admitted in the sentencing context and that *J.-L.J.* stands for the proposition that it is inadmissible for the purposes of establishing guilt.

Given the questions raised in the literature about the reliability and validity of phallometric test results for forensic purposes (Ref. 1, pp 142–3), it is important that experts be careful to qualify their opinions appropriately and to avoid overstating the validity or predictive utility of phallometric evidence. This exercise of caution appears to be particularly important when assessing negative results. If the experts do not, there is a risk that courts may give undue weight to the evidence or that sentencing outcomes may turn on the particular views of the experts who happen to testify. This may produce unfair inconsistency in the criminal justice system. The Criminal Code provides that “a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances” (Ref. 19, § 718.2(b)).

Although there are cases in which experts differ on the proper interpretation of the phallometric

evidence, the expert testimony in recent Canadian criminal cases is by and large consistent, and the conclusions seem usually to be properly qualified so as to assist the courts in drawing reliable conclusions. Despite this, one potential source of concern relates to the emphasis in some cases that “the thing that is most highly correlated with risk for sexual re-offence is having a positive phallometric test for pedophilia,” or that “[i]t is a red flag that identifies a very significant risk factor for sexual re-offence that should not be ignored” [emphasis added] (Ref. 42, ¶¶ 191–2). These statements may invite courts to assume that the level of correlation is very high, rather than that it is high relative to other possible predictive factors.<sup>111</sup> As noted earlier, a deviant phallometric response adds only 1 of a possible maximum of 51 points on the SORAG actuarial scale.<sup>10</sup> It is not clear in the quoted case whether the experts made this clear in their testimony. In any event, it is advisable for experts to be careful to avoid misleading the courts about the strength of the correlation between deviant sexual interests and sexual recidivism.

## Conclusion

Canadian courts regularly hear phallometric evidence in criminal proceedings in a manner that appears to be generally consistent with the expert consensus on its proper role in the forensic context. Phallometric evidence assists the courts during the process of crafting fair and appropriate sanctions that address the needs of sex offenders and the interests of society. It is important, however, that experts and courts engage in an ongoing dialogue about the proper scope and function of phallometric evidence in the criminal court process. Without this dialogue, courts run the risk of undue and risky reliance on one of several tools in the toolbox.

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