

CANADA / JUDGMENT

R. v. Frenchy

2026 BCSC 73

COURT

Supreme Court of British Columbia

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2026 BCSC 73 R. v. Frenchy

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Frenchy,

2026 BCSC 73

Date: 20260116

Docket: 92597

Registry: Nanaimo

Rex

v.

Donavan Travis Frenchy

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Corrected Judgment: The judgment was corrected on the front page on April 24, 2026.

Before: The Honourable Justice Layton

Reasons for Judgment

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Parties' Written Submissions:

December 11, 2025

January 5, 2026

Place and Date of Judgment:

Nanaimo, B.C.

January 16, 2026

Table of Contents

INTRODUCTION..... 3

F.B.'s Allegations and the Evidence Subject to the Stage One Analysis. 4

Applicable Legal Principles. 9

Discussion.. 13

Restrictions on Access. 20

Conclusion.. 21

- [1] The Indictment charges Donovan Frenchy with sexually assaulting F.B. on October 15 to 16, 2022. Mr. Frenchy's judge-alone trial is set to commence on October 19, 2026, and is anticipated to take five days in total.
- [2] At trial, the Crown wishes to elicit from F.B. testimony that she and Mr. Frenchy only met once prior to the alleged offence and had no sexual history, and that she identified as a lesbian and was thus sexually disinterested in Mr. Frenchy. The Crown contends that this testimony is circumstantial evidence probative on the issue of whether F.B. consented to the alleged sexual encounter.
- [3] The Crown applies to have this evidence admitted pursuant to the two-stage, common law screening process set out in *R. v. Kinamore*, 2025 SCC 19, which holds that Crown-led evidence of sexual activity other than that forming the subject matter of the charge is otherwise presumptively inadmissible.

- [4] At a pretrial conference, I directed that the parties file written submissions setting out their positions on whether the requirements at the first stage of the Kinamore screening process had been met. I would inform the parties if in my view oral argument was also required. But if not, I would make the first stage admissibility determination based solely on the written submissions, as permitted by Kinamore at para. 50.
- [5] Neither party objected to proceeding in this fashion, and the parties have since filed their written submissions addressing stage one of Kinamore.
- [6] The Crown written submissions assert that the first-stage threshold has been met, and that the Crown application should proceed to a second-stage hearing. By contrast, the defence written submissions contend that the threshold at stage one has not been met, and that the Crown's application should be dismissed without the need for a stage two hearing.
- [7] Having considered the parties' written submissions, I have determined that oral submissions are unnecessary in order to decide whether the Crown has met the threshold at stage one. These reasons set out my decision as to whether that threshold is met.
- [8] I will start by describing the relevant background, including the nature of the evidence that is the focus of the stage one analysis. I will then review the legal principles articulated in Kinamore. After that, I will apply those principles to the application record to determine whether stage one of the Kinamore screening process has been met.

F.B.'s Allegations and the Evidence Subject to the Stage One Analysis

- [9] I begin my review of the allegations by noting that the materials relied on by the Crown are limited to the transcript of a video-recorded statement given by F.B. to a police officer about two weeks after the alleged offence, and otherwise unsupported assertions made in the Crown's notice of application and stage one written submissions.
- [10] The just-mentioned statement is heavily redacted. Perhaps for this reason, although I cannot be sure, it at times requires a close interpretation of the back-and-forth exchanges to ascertain F.B.'s meaning. Even then, the reader is on occasion required to make reasonable inferences. And certain core allegations are not made anywhere in the statement, for instance that F.B. was sexually assaulted. Plus, it appears that some of the information in the unredacted portions of the statement was previously given by F.B. to the police, whether in the redacted part of the statement or prior to that statement commencing. If so, those earlier utterances have not been put before me by the Crown in the form of a transcribed statement or police notes.

- [11] I mention these aspects of the application record, and in particular the statement relied on by the Crown, for two reasons. First, they explain the rather laborious interpretative process I have had to engage in to ascertain the nature of the allegations, and to a lesser extent the nature of the evidence whose admissibility is in issue. Second, they potentially impact the application of the Kinamore principles in this case, a topic to which I will return later in these reasons.
- [12] Having made these preliminary comments, I will set out the relevant information in the statement, as supplemented by assertions made in the notice of application.
- [13] In the statement, F.B. tells the police officer about a man named "Donovan", which I note from the filed Indictment is Mr. Frenchy's first name. F.B. states that she knows Donovan through work, and that he is an unhoused community member who accesses primary care outreach and supports that "we" provide. It is reasonable to infer that F.B. uses the first-person plural "we" to include herself as a provider of these services. Indeed, F.B. subsequently states that she provides "Indigenous" support for individuals such as Donovan. F.B. also states that she does not "personally know" Donovan, having first met him about four weeks previous when she brought him and others a case of beer.
- [14] In the statement, the officer says, "so you were given a, a, a drink by Donovan and you figure about two ounces of Crown Royal". F.B. responds by stating that she could have had more than this, presumably meaning more whisky, but "I couldn't even tell you". She then elaborates:

Because it was like a half an hour I, and, and I, I went limp, like, 'cause I remember peeing in the tent and I don't. And I couldn't move. To be honest I'm a scrapper. I've gone through so much, in my life that I always found a way to defend myself and there wasn't even a defence mark.

- [15] Given this exchange, it is reasonable to infer that in referencing F.B. being given a drink of whisky by Donovan, the officer was repeating to F.B. something she had said previously, whether earlier in the redacted part of the statement or to another officer in a different interview, and that in her answer F.B. is:
- (a) implicitly agreeing that Donovan gave her a drink containing about two ounces of whisky (which later in her statement she says she drank all at once, in one shot);
 - (b) adding that she may have had more whisky afterwards, but she could not say for sure;
 - (c) explaining her inability to say for sure by pointing out that she was significantly incapacitated with respect to her ability to move and that but for this incapacity she would have defended herself; and
 - (d) implicitly stating that she lacked a memory of whatever it was that happened with respect to which she would ordinarily have defended herself, given that she appears to have come to this conclusion, not because she was conscious but unable to move, but rather because she later observed no defence marks on her body.

[16] The officer then says to F.B., "So you remember having the drink with the group of four or five people. What do you remember after? Did you, did you?". Based on this exchange, it is reasonable to infer that F.B. had previously told the officer or another officer that she consumed the shot of whisky provided to her by Donovan in the company of four or five people, including Donovan.

[17] F.B. then continues with her narrative, it appears for the purpose of setting out what she recalled after drinking the shot of whisky, and states that she remembered speaking with "Joey" and Donovan, "and then I remember being in the tent and I couldn't tell you what time it was, I didn't know where my stuff was and I couldn't move".

[18] The officer's response to F.B.'s comment and the exchange immediately afterwards is as follows:

Officer: So you, you were blacked out for a period of time, or you don't, you don't remember, uh, a period of time after.

F.B. Yeah.

Officer: He took those, that shot. Uh, you woke up in a tent.

F.B. Uhm, for our, our, for a very short period of time before I.

Officer: But you, but you woke up?

F.B. Yeah.

Officer: And you blacked out again?

F.B. Yeah.

Officer: 'Kay.

F.B. And probably remember about five, five, 10 minutes of it. And I had my sweater was on and, but my pants and my underwear were down to my ankles. And he was behind me.

[19] Based on the exchanges set out in the previous two paragraphs, it is reasonable to infer that F.B. was in effect stating that: (a) she recalls drinking the shot of whisky, then speaking to Donovan and another person, probably a male given her use of the name "Joey"; (b) her next memory is waking up in a tent with her pants and underwear around her ankles, with a male ("he") behind her; and (c) she blacked out again.

[20] The statement does not identify who was behind F.B. or what he was doing. Nor does the statement indicate whether F.B. knew whose tent she was in at the time. And nowhere in the statement, which I again emphasize is heavily redacted, does F.B. say that she was sexually assaulted. That said, given F.B.'s earlier reference to the lack of any defensive marks on her body, it is reasonably possible to infer that the charged sexual assault occurred when she was in the tent and experiencing the described periods of unconsciousness and/or an inability to move.

- [21] In any event, the notice of application expressly states that F.B. has alleged that the tent in question belonged to Mr. Frenchy and that, when she woke up, he was penetrating her from behind. The notice of application further expressly states that F.B. later attended at the hospital where a SANE examination was conducted, and "samples taken from her during that examination confirmed the presence of male DNA closely matching" Mr. Frenchy's DNA profile. The notice of application does not, however, indicate from where the DNA samples were taken.
- [22] The defence written submissions do not suggest that I cannot rely on this information from the notice of application in determining whether the requirements of stage one of Kinamore have been met. In this respect, I note that the Crown is sometimes permitted to rely on assertions made in submissions or in a notice of application. As I recently stated in *R. v. R.W.Q.*, 2025 BCSC 2402, albeit in the context of whether oral evidence needed to be called in support of a Crown application:
- [33] Guidance in determining whether oral evidence is required on an admissibility voir dire is provided in *R. v. Aragon*, 2022 ONCA 244 at paras. 37-40. Aragon notes that it is often not only common but preferable in the interests of efficiency to conduct an admissibility voir dire based on information that would not be admissible at the trial proper. If the underlying facts material to admissibility are not contested, oral evidence will probably not be required. On the other hand, the Crown cannot rely on bald factual assertions amounting to nothing more than a wish list of the testimony it hopes the witnesses would provide. Instead, proper supporting materials for the proposed evidence of the witness should be provided.
- [34] Although the Crown in this case is relying on disclosure materials in support of its application to authenticate the two documents in question, it is worth adding that the submissions of counsel alone are commonly relied on by courts in a variety of circumstances: *R. v. J.L.K.*, 2023 BCCA 87 at para. 47. To provide but one example, the relevance of proposed evidence is generally determined on the basis of submissions of counsel, no doubt because the threshold for relevance is low and concepts such as ultimate reliability and probative weight have no place in determining relevance: *R. v. Schneider*, 2022 SCC 34 at para. 39; *R. v. Blackman*, 2008 SCC 37 at para. 30.
- [23] Here, the defence has not suggested that the assertions in the notice of application that F.B. was sexually assaulted and that she has stated that Mr. Frenchy was penetrating her from behind, amount to nothing more than a wish list of the testimony that the Crown hopes she will provide. I am therefore permitting the Crown to rely on these assertions to provide the necessary context with which to assess whether the evidence that is the subject of the application meets the threshold at stage one of Kinamore: *R. v. Schneider*, 2022 SCC 34 at paras. 40-41.

- [24] Returning to the contents of the statement, at one point the officer says to F.B. that she has indicated that she has been a lesbian for 20-plus years. She implicitly agrees, insofar as she responds by stating that she "came out of the closet" at about age 14 and last had consensual sex with a man when she was aged 18.
- [25] As an aside, it is reasonable to infer that F.B. must have previously disclosed to this officer or another officer this information about being a lesbian, although any such earlier utterance is not set out in the materials filed on the application.
- [26] The application record does not indicate F.B.'s age, but given that she appears to have told the officer that she has been a lesbian for 20-plus years, and states that she came out at age 14, it is reasonable to infer that she must have been at least 34 years of age at the time of making the statement. Given that F.B. says she has not had consensual sex with a man since age 18, it is reasonable to further infer that she is in essence telling the officer that she has not had consensual sex with a man for at least 16 years.

Applicable Legal Principles

- [27] At common law, Crown evidence of a complainant's other sexual activity is presumptively inadmissible: Kinamore at para. 33. When I say "other" sexual activity, I mean sexual activity other than the sexual activity that forms the subject matter of the charge.
- [28] The term "sexual activity" encompasses evidence of sexual inactivity: Kinamore at paras. 64-80. Kinamore at para. 64 defines evidence of "sexual inactivity" and also states that such evidence is subject to the rule of presumptive inadmissibility:

Sexual inactivity evidence can be understood as encompassing evidence that the complainant has not previously engaged in, or prefers not to engage in, any sexual activity, certain types of sexual activity, or sexual activity under particular circumstances (see S. Mazzuca, "Regulating the Admissibility & Use of Sexual Inactivity Evidence in Criminal Cases" (2022), 70 C.L.Q. 161, at p. 165). As I will explain, while there are relevant purposes for which they can be used, all of these types of evidence form part of a complainant's sexual history and should thus be treated as presumptively inadmissible.

- [29] The common law rule rendering evidence of other sexual activity, including sexual inactivity, presumptively inadmissible guards against the risk that the fact-finder will engage in twin-myth reasoning. The twin myths are that by reason of other sexual activity: (a) the complainant has a propensity to consent and thus is more likely to have consented to the sexual activity forming the subject-matter of the charge; and (b) the complainant is less worthy of belief. See Kinamore at para. 36.
- [30] The rule of presumptive inadmissibility also avoids the fact-finder evoking other discriminatory myths and stereotypes about sexual assaults, some of which may be disadvantageous to the accused: Kinamore at para. 37.

- [31] Ultimately, the rule of presumptive inadmissibility is rooted in the desire to: (a) exclude irrelevant or misleading evidence; (b) protect an accused's right to a fair trial; and (c) safeguard the dignity, privacy and equality interests of complainants: Kinamore at para. 35.
- [32] However, evidence of other sexual activity, including sexual inactivity, is not categorically excluded, but rather is only excluded to eliminate discriminatory lines of reasoning: Kinamore at paras. 81-82.
- [33] To overcome the barrier of presumptive inadmissibility, the Crown must establish that the evidence of other sexual activity has probative value that outweighs any attendant prejudicial impact. The nature of this weighing exercise is modified where both the Crown and defence seek to rely on the same evidence of other sexual activity, but that has not occurred in this case, and therefore nothing further need be said about this modification. See Kinamore at para. 38.
- [34] In weighing the probative value and prejudicial effect of Crown-led evidence of a complainant's other sexual activity, trial judges must consider the non-exhaustive list of factors set out in s. 276(3) of the Criminal Code, R.S.C. 1985, c. C-46, albeit keeping in mind that some of those factors have been articulated with defence-led evidence in mind: Kinamore at para. 40.
- [35] The factors listed in s. 276(3) are as follows:
- (a) the interests of justice, including the right of the accused to make a full answer and defence;
 - (b) society's interest in encouraging the reporting of sexual assault offences;
 - (c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;
 - (d) the need to remove from the fact-finding process any discriminatory belief or bias;
 - (e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;
 - (f) the potential prejudice to the complainant's personal dignity and right of privacy;
 - (g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and
 - (h) any other factor that the judge, provincial court judge or justice considers relevant.
- [36] The admissibility of Crown-led evidence of other sexual activity must be determined on a voir dire that mirrors the screening process for defence-led evidence of other sexual activity that is set out in s. 276 and its associated Criminal Code provisions: Kinamore at para. 43.
- [37] This process for determining whether the rule of presumptive inadmissibility has been overcome has two stages.

- [38] At stage one, the Crown must file a written application setting out the detailed particulars of the evidence it seeks to adduce and the relevance of that evidence to an issue at trial. Notice to the defence will generally be at least seven days prior to the hearing of the application, which should usually be heard before the trial starts. See *Kinamore* at paras. 45-48, 55.
- [39] Stage one is designed to decide whether an evidentiary hearing should be held and to facilitate the dismissal of frivolous applications. The court therefore restricts its inquiry to determining whether the Crown has complied with its procedural obligations and whether the evidence sought to be adduced is capable of being admissible. Evidence will be incapable of being admissible where the stated relevance engages prohibited myth-based reasoning. The judge may also use the stage one inquiry to determine whether the evidence constitutes evidence of other sexual activity so as to be presumptively inadmissible. See *Kinamore* at para. 49.
- [40] In *R. v. Comin*, 2022 BCSC 530 at para. 61, Justice Ker adopted the following articulation of the stage one inquiry from Justice Devlin's decision in *R. v. Kapustinsky*, 2020 ABQB 611, which while relating to a defence application under s. 276 nonetheless provides guidance in the context of a Crown application to elicit evidence of other sexual activity:
- [21] The first stage does not determine ultimate admissibility under 276(3). This preliminary step is meant to screen out those requests to raise other sexual activity which, on their face, are clearly brought for an impermissible purpose: *R v JE*, 2019 NLSC 134 at paras 47-51. At this point in the process, the Court must be satisfied that the evidence tendered with the application "is capable of being admissible under section 276 (2)". (s 278.93(4)) [emphasis added]
- [22] Only those applications which pass this threshold are sent to a full hearing under s 278.94. Applications which lack sufficient detail risk being summarily dismissed: *R v LeBrocq*, 2011 ONCA 405 at paras 9 & 10.
- [23] The guiding jurisprudence identifies two key questions the Court must ask at the first stage: (i) is the proposed evidence sufficiently well-defined and circumscribed to serve a proper purpose; and (ii) can the accused articulate the mechanism of relevance to which those specific facts relate. A detailed examination of the relevance mechanism, and the overall balancing of interests the probative and prejudicial value of the evidence, are reserved for the full hearing.
- [24] The preliminary screening is designed to weed-out meritless uses of other sexual activity evidence which are simply manifestations of the increasingly well-defined archetypes of prohibited reasoning. These are meant to be eliminated summarily, without disruption to the trial process, and without needlessly traversing these sensitive matters.

[25] The threshold for the accused to overcome at the first stage is low. The Court conducts only a facial consideration of the matter, with any doubts that exist as to the admissibility of the evidence best left to the second stage voir dire: *R v SL*, 2018 ABQB 889 at para 9; *R v AM*, 2020 ONSC 4541 at para 32. This first stage takes place in camera: s 278.93(3).

[original emphasis]

- [41] In keeping with Justice Devlin's comments in *Kapustinsky*, in *R. v. A.R.*, 2024 BCSC 2644 at para. 17, Justice Gibb-Carsley observed that the first stage of the screening mechanism focuses on weeding out unmeritorious applications for the admission of other sexual activity, and that the "capable of being admissible" threshold, by its language and function as a first-stage screening mechanism, dictates a broad, not overly strict approach. In practical terms, relevance will almost inevitably be the main focus at stage one. See also *A.R.* at para. 28.
- [42] Stage two of the Kinamore process determines whether the evidence of other sexual activity is admissible. This requires the judge to decide whether the Crown has proven on a balance of probabilities that the evidence is relevant to an issue at trial and that the probative value of the evidence is not outweighed by its prejudicial effect. As noted, the factors in s. 276(3) must be used to guide this analysis, and the weighing exercise is modified where the defence seeks to adduce the same evidence pursuant to s. 276(2). See *Kinamore* at para. 52.
- [43] Unlike under the s. 276 regime, the complainant does not have automatic standing to make submissions at the stage two hearing regarding the admissibility of Crown-led evidence of other sexual activity. The reason for this distinction is that the views of the Crown and complainant will often align on the issue of admissibility, and granting standing as a right thus risks unnecessary expense and delay. Nonetheless, judges retain the discretion to grant a complainant standing at stage two, which may be particularly important where the complainant and Crown differ on the issue of admissibility. See *Kinamore* at para. 53.
- [44] As is the case under the s. 276 regime, the complainant is not compellable at the stage two hearing: *Kinamore* at para. 54.
- [45] At the conclusion of the stage two hearing, the judge must provide reasons for the admissibility determination. If some or all of the evidence is admitted, the judge must explain precisely how the evidence is relevant to an issue at trial and how they assessed the probative value and prejudicial effect of the evidence in light of the factors enumerated in s. 276(3). See *Kinamore* at para. 56.
- [46] Where evidence of other sexual activity is ruled admissible for a proper purpose, the trial judge must instruct the jury as to the use it can and cannot make of that evidence: *Kinamore* at paras. 28, 36, 60.

Discussion

- [47] As noted, the Crown wishes to adduce evidence from F.B. that she and Mr. Frenchy had only met once prior to the date of the alleged offence and had no sexual history, and that she identified as a lesbian and therefore was sexually disinterested in Mr. Frenchy. The Crown says that this anticipated testimony is admissible as circumstantial evidence bearing on whether F.B. consented to having sex with Mr. Frenchy. Crown submits that it has met the requirements to pass stage one of the Kinamore process, and that its application should therefore move on to an evidentiary hearing at stage two of that process.
- [48] The defence argues that the Crown has not met the necessary requirements at stage one, and that the Crown's application should therefore be dismissed without the need to hold an evidentiary hearing at stage two.
- [49] I have three preliminary comments to make before determining whether the stage one threshold has been met.
- [50] First, I am proceeding on the basis that in seeking admission of the evidence on the issue of consent the Crown is referring to both whether F.B. was capable of consenting and whether she did, in fact, consent, because these matters that are "inextricably joined": *R. v. Rioux*, 2025 SCC 34 at para. 66.
- [51] Second, the Crown has framed the evidence as encompassing two matters: that F.B. had not previously had sex with Mr. Frenchy; and that she identifies as a lesbian and was therefore not sexually interested in Mr. Frenchy. However, in my view the evidence with respect to which the Crown application is brought can be compendiously viewed as F.B.'s anticipated testimony that: (a) she has identified as a lesbian since age 14; (b) she last had consensual sex with a male at age 18, which was over 20 years prior to date of the alleged sexual assault; and (c) she was therefore not interested in sex with men, including Mr. Frenchy, at that time.
- [52] Third, I have previously referred to certain challenges that I have encountered in interpreting F.B.'s statement, given that it is heavily redacted and, whether for that reason or otherwise, appears not to contain her allegations about aspects of the sexual assault charged in the Indictment or her initial utterances regarding the evidence that the Crown wishes to have ruled admissible on this application. Without purporting to decide the matter, these aspects of the application record may have the potential to impact the probative value attributed to the evidence whose admissibility is in issue, and thus whether it meets the threshold at stage two. But that is not something I need determine at stage one of the Kinamore process.
- [53] With these preliminary comments out of the way, I will address whether the evidence in question falls within the definition of sexual activity as set out in the case law.
- [54] I am satisfied that the evidence does fall within this definition.

- [55] The evidence that F.B. has long identified as a lesbian and at the time of the alleged offence had not had consensual sex with a male for at least 16 years can reasonably be viewed as an implicit assertion that she prefers not to engage in sexual activity with men. This preference constitutes other sexual activity as defined in Kinamore at para. 64, and thereby renders the evidence presumptively inadmissible and subject to the Kinamore screening regime.
- [56] My next task is to determine whether this evidence of sexual inactivity with men and a sexual preference for women meets the threshold at stage one of the screening process.
- [57] In the circumstances, I conclude that the evidence does meet this threshold.
- [58] The application has been brought in writing, and sets out detailed particulars of the evidence to be adduced and its purported relevance. While the application record appears not to provide a comprehensive review of every statement F.B. has made to police about her period of sexual inactivity with men and her sexual preferences as a self-identified lesbian, the fact remains that the Crown has provided detailed particulars of that evidence sufficient to permit me to determine its potential relevance to an issue at trial.
- [59] In this respect, the fact that I have been provided with no statement in which F.B. expressly states that she was sexually assaulted by someone, be it Mr. Frenchy or anyone else, is not determinative.
- [60] This is a sexual assault prosecution. To prove a sexual assault the Crown must establish that F.B. did not consent to the alleged sexual activity. The statement with which I have been provided allows me to infer that F.B. has told police that she was not conscious during, or has no memory of, at least some of the material events during the relevant time period. The Crown's notice of application makes clear that it is alleging that the sexual assault occurred while F.B.'s memory was so impaired, and that it is seeking an admissibility ruling on the evidence regarding her lack of consensual sexual activity with men and her sexual preferences as set out in the statement. That evidence is sufficiently particularized to permit me to assess whether it is capable of being admissible on the issue of consent while F.B.'s memory was impaired.
- [61] I will therefore next consider whether the evidence in question is "capable of being admissible" for this purpose.
- [62] The jurisprudence is clear that where a complainant professes to have an incomplete memory regarding the circumstances surrounding a sexual encounter, the trier of fact may be permitted to draw inferences from evidence of the complainant's beliefs and assumptions about how she would have acted in the circumstances. From these pre-existing attitudes and assumptions, it may be reasonable for the trier of fact to infer that the complainant did not consent to the sexual activity that forms the subject matter of the charge, although care must be taken in this regard because people do not always do what they say they would have done, and intoxication can in particular lead people to do things and make choices they would not have done or made if sober. See Rioux at paras. 75, 86 and

115; Kinamore at para. 85; R. v. Kontzamanis, 2011 BCCA 184 at para. 31; R. v. Capewell, 2020 BCCA 82 at para. 49; R. v. Al-Akhali, 2025 ONCA 229 at para. 52; R. v. Fairy, 2024 NBCA 92 at para. 42; R. v. Garciacruz, 2015 ONCA 27 at para. 69.

- [63] The Crown relies on this case law in relation to the evidence of F.B.'s previous sexual inactivity with men and her sexual preference for women. In this respect, the Crown asserts that evidence from F.B. that she has identified as a lesbian for many years and does not have sex with men is circumstantial evidence bearing on whether she consented to the sexual activity in issue, and that this circumstantial evidence is particularly important because she lacks a complete memory of the time period during which the Crown alleges that the sexual assault occurred.
- [64] Based on this case law, in my view the evidence sought to be adduced is capable of being admissible at trial. It is sufficiently well-defined and circumscribed to serve a proper purpose in resolving the disputed issues at trial, specifically the issue of consent, and the Crown has articulated a mechanism of relevance to which the evidence relates that does not rely on discriminatory reasoning. To put it another way, the Crown's proposed evidence is not a meritless use of sexual inactivity or preference evidence that is simply a manifestation of prohibited reasoning.
- [65] The defence written submissions do not take issue with the notion that where a complainant's memory of an alleged sexual encounter is significantly impaired the Crown can elicit from the complainant her beliefs and assumptions about how she would have acted as circumstantial evidence on the issue of consent.
- [66] The defence has nonetheless put forward a number of arguments in support of its position that the threshold at stage one of Kinamore has not been met. In my view, however, these arguments are not persuasive on the issue of whether the Crown has met this modest threshold.
- [67] While I have considered the defence arguments as a collective whole, and not piecemeal, I will address each of them separately in the remainder of this section of my reasons.
- [68] One defence argument is that F.B.'s statement to police was made over three years ago, and there is no basis to believe that since the statement was given she has continued to abstain from having sex with men.
- [69] This may be a matter upon which the defence can attack the probative value of the evidence at stage two, and may also be something on which the defence can cross-examine F.B. if the evidence ends up being admitted at trial. But based on the case law reviewed above it, the possibility that F.B.'s sexual preferences may have changed subsequent to making the statement does not render the evidence irrelevant on the issue of whether she consented to sexual activity with a man at the time of the alleged offence. To be relevant, evidence need not conclusively establish a fact in issue, but rather need only make that fact more or less likely. No particular level of probative value need be established. See Schneider at para. 39.

- [70] A second defence argument is that the police officer conducting the interview was the one who suggested that F.B. blacked out for a period of time, and although she responded by stating "yeah" she did not particularize whether she blacked out as opposed to simply being unable to remember.
- [71] Yet the case law addressing the admissibility of circumstantial evidence of sexual inactivity or preference is not restricted to circumstances where the complainant has "blacked out". Plus, a reasonable interpretation of F.B.'s statement is that she agrees that she blacked out, or at the very least that her memory of the events was substantially impaired in a sudden and unusual way, as opposed to by the mere passage of time. Once again, the defence argument may carry some weight at stage two of the analysis, or in closing submissions if the evidence is admitted at trial, but it does not support the conclusion that the evidence is not capable of being admitted.
- [72] A third defence argument is that F.B. does not disclose whether other women were present at the time, which might explain her state of undress.
- [73] As with the previous two defence points, this argument perhaps goes to the probative value of the evidence in question, whether at stage two or in relation to the determination of guilt or non-guilt if the evidence is ruled admissible. But the argument does not render the evidence irrelevant on the issue of whether F.B. consented to sex with a man, including Mr. Frenchy, at the time in question. And the defence does not suggest that this issue will not be disputed at trial.
- [74] A fourth defence argument is that the statement does not refer to "Donovan" penetrating F.B.
- [75] I agree with the defence observation on this point. Indeed, as already noted, in the statement F.B. does not even expressly assert that she was sexually assaulted. However, the Crown's notice of application indicates that F.B. has asserted that Mr. Frenchy penetrated her from behind without her consent, and that the SANE examination yielded male DNA. Regardless, and therefore much more importantly, the issue of identity is distinct from the issue of consent. Potential weaknesses in the Crown case on identity does not mean that evidence relevant to consent is incapable of being admissible at trial.
- [76] A fifth defence argument is that in the police statement F.B. does not expressly state that, because she identifies as a lesbian and has not had consensual sex with a man for many years, she would not have engaged in sexual activity with a man.
- [77] However, read in context it is reasonable to infer that F.B.'s comments about her sexual preferences and when she last had consensual sex with a man constitute an implicit assertion that she is not interested in having sex with a man and would not have consented to do so. Her failure to make this assertion expressly might possibly impact the probative value of the evidence, whether at stage two or at trial if the evidence is ruled admissible, but it does not operate to render the evidence incapable of being admitted at trial.

- [78] The final defence argument with respect to stage one of Kinamore is that any probative value that the evidence might have is low and would be outweighed by the risk of prejudice to the accused.
- [79] However, the defence has not identified any particular sort of prejudice that might arise from the evidence.
- [80] That said, I recognize that there may be a potential for prejudice associated with the evidence of sexual inactivity and sexual preference that the Crown seeks to lead in this case. As noted, people do not always do what they say they would have done in a particular circumstance, especially when intoxicated (whether voluntarily or involuntarily). There may also be a potential danger in a trier of fact concluding that any woman who identifies as a lesbian would never have sex with a male under any circumstances.
- [81] But weighing probative value and prejudicial effect should generally await the rigorous and very specific analysis at the second stage of Kinamore, as opposed to being considered at the first stage, and if there is doubt as to whether prejudicial impact of the evidence outweighs its probative value a judge should err on the side of finding that the first stage threshold is met: A.R. at para. 20.
- [82] At this stage in the analysis, and given the submissions I have received to this point, I cannot say that the prejudicial impact of the presumptively inadmissible evidence will undoubtedly outweigh its probative value. I am therefore satisfied that the potential for prejudice is not so great as to justify the conclusion that the evidence is incapable of being admissible for the purpose identified by the Crown.

Restrictions on Access

- [83] A hearing held to determine whether evidence meets the requirements at stage one of Kinamore is typically held in camera and must be subject to a publication ban: Kinamore at paras. 42 and 58.
- [84] In this case, I have determined the stage one issue on written submissions only. I am therefore making an order sealing all materials filed to date in relation to the Crown's application. I am also making an order prohibiting the publication of: (a) the contents of the Crown's application; (b) any evidence taken, information given or representations made on the application; and (c) these reasons and their contents.

Conclusion

- [85] The Crown has met the low threshold needed to satisfy stage one of the Kinamore analysis. Among other things, the evidence in question is capable of being admitted at trial. Accordingly, an evidentiary hearing will be held to determine whether the probative value of that evidence outweighs any attendant prejudicial impact so as to overcome the presumption of inadmissibility.

- [86] As a final point, I wish to return to my comments earlier in these reasons regarding the evidentiary foundation for the Crown's application.
- [87] While it is up to the Crown to determine what evidentiary foundation will be relied upon on a Kinamore application, I have identified concerns that, at the very least, have presented me with some challenges in ascertaining the allegations made by F.B. against Mr. Frenchy. Given the limited issues to be decided at stage one of the Kinamore process, it was not necessary for me to determine whether the nature of the evidentiary foundation might negatively impact the probative value of the Crown's evidence. The comments about probative value that I have made above are not meant to be determinative one way or another as to whether this is the case.
- [88] However, if having considered my comments the Crown wishes to file further materials to expand the evidentiary foundation for its application, it may do so provided that those further materials are filed and served no later than January 21, 2026, absent an agreement by the parties to extend that deadline, and that the defence is not thereby unduly prejudiced in responding to the further materials.
- [89] If further materials are filed and served by the Crown and there is a dispute as to whether I should consider them on the application, I will hear that argument at the same time as I hear the argument regarding whether stage two of Kinamore has been met, provided that the defence explains the basis for its objection in a written submission that is filed and served no later than two clear days prior to the scheduled hearing.
- [90] If the parties file materials pursuant to the previous two paragraphs of these reasons, they should simultaneously ask that the materials be promptly forwarded to me in electronic form.

"D. Layton J."

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