

CANADA / JUDGMENT

R. v. Frenchy

2026 BCSC 430

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Supreme Court of British Columbia

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2026 BCSC 430 R. v. Frenchy

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Frenchy,

2026 BCSC 430

Date: 20260306

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Registry: Nanaimo

Rex

v.

Donavan Travis Frenchy

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Before: The Honourable Justice Layton

Oral Reasons for Judgment

Counsel for the Crown:

J.E. Simpson

Counsel for the Accused:

S.W. Sheets

Place and Date of Hearing:

Nanaimo, B.C.

March 6, 2026

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Introduction

- [1] Donovan Frenchy is charged with sexually assaulting F.B. on October 15 to 16, 2022. His judge-alone trial is set to start before me on October 19, 2026.
- [2] At trial, the Crown wishes to elicit testimony from F.B. that she has identified as a lesbian for over two decades, and would therefore not have consented to sexual activity with 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, as well as whether she had the capacity to consent. The Crown also seeks to elicit from F.B. that she did not have sex with Mr. Frenchy at any time other than the charged incident, to rebut any suggestion that DNA found on her vaginal area or underwear was deposited there on a different occasion.
- [3] The Crown has applied to have this evidence admitted pursuant to the two-stage, common law screening process described 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 presumptively inadmissible.
- [4] On January 16, 2026, I ruled that the Crown had satisfied stage one of the Kinamore screening process, because the evidence regarding F.B.'s sexual orientation was relevant to the issues of consent and capacity to consent, and thus capable of being admitted at trial: *R. v. Frenchy*, 2026 BCSC 73. Due to a misunderstanding, in that ruling I did not directly address the relevancy of F.B.'s anticipated evidence that she did not have sex with Mr. Frenchy on any other occasion, but I will do so later in these reasons.

- [5] A stage-two Kinamore hearing was held before me today to determine whether the probative value of the evidence in question outweighs any attendant prejudicial impact so as to overcome the presumption of inadmissibility. The Crown asserts that this admissibility threshold has been met, while the defence submits that I should reach the opposite conclusion.
- [6] I did not exercise my discretion to grant F.B. standing to make submissions at today's stage-two hearing, because having obtained independent legal advice F.B. has told the Crown that she wants to be able to give the evidence in question in court. She therefore agrees with the Crown that this evidence should be admitted. See Kinamore at para. 53.
- [7] In determining whether the stage-two admissibility threshold has been met, I will begin by describing F.B.'s allegations, including the anticipated evidence regarding her sexual orientation. I will also mention the Crown's DNA evidence on the issue of identity. Next, I will review the legal principles articulated in Kinamore. I will then apply those principles to determine whether the probative value of the evidence outweighs its prejudicial impact.

The Evidence in Context

- [8] F.B.'s allegations are set out in a statement given to Cst. Nathan Lord at the Nanaimo RCMP detachment on October 31, 2022. F.B.'s partner J.K. was also present at the interview.
- [9] F.B. told Cst. Lord that on the evening of October 15, 2022, she had dinner and a couple of beers. A couple of hours later, F.B. was hungry and went to an A & W, after which she ran into her friend Joey. Joey was an unhoused Indigenous man, who F.B. described as a "regular at our service". Joey drove her to 1 Port Drive, which is a large property near the train tracks, with a grassy area where a lot of people had been camping.
- [10] F.B. and Joey arrived at about 11:00 p.m. Five or six people were present, including a man F.B. already knew named Donovan. She did not know any of the other people. F.B. described one of these other people as an extremely inebriated Caucasian woman. Also present were an Indigenous man in his early 40s, and a Caucasian couple that ended up leaving.
- [11] F.B. explained to Cst. Lord that she knew Donovan through her work, describing him as an unhoused community member who accesses the primary care outreach van and the supports that "we" provide. F.B. indicated that she was the Indigenous support for that community.
- [12] F.B. said that she had first met Donovan about four weeks previous, when she and J.K. brought some unhoused community members a case of beer at the bus stop where they tend to hang out. Donovan did not have a street name, as far as F.B. knew, and she had recently been told his last name by her boss. F.B. described Donovan as "apparently" 33 years old, and about 5'7" tall, with short black hair, brown eyes and a wide nose. He had a slim athletic build, and she knew that he came from the Snaw-Naw-As First Nation.

- [13] F.B. told Cst. Lord that Donovan and the Indigenous man offered her a clear cup containing about two ounces of whisky. She initially declined the offer, but Donovan encouraged her to have a drink for "Rocky", a person who had recently passed away, so she drank the whisky all at once.
- [14] F.B. indicated that she recalled next speaking with Joey and Donovan, but after about half an hour she did not remember very much. F.B. stated that, because she does not drink to the point where "I black out like that", she was pretty sure there was "something" in the drink. She later mentioned GHB as a possibility.
- [15] F.B. told Cst. Lord that she vaguely remembered waking up in a tent. She did not know what time it was. Her pants and underwear were at her ankles. She was lying on her side, and Donovan was penetrating her "vag" with his penis from behind. F.B. was unable to move or speak - she tried to say "stop", but felt like nothing was coming out and that it was more like a slur. F.B. did not recall whether anyone else was in the tent. This was a short period of consciousness, maybe five or ten minutes, after which she blacked out again.
- [16] F.B. said that she believed that Donovan was not wearing a condom, because she could tell the difference between skin and latex. She did not know whether Donovan had ejaculated inside her. She reported having some bruises but not many.
- [17] Asked by Cst. Lord how she knew that it was Donovan behind her, F.B. said that, to be honest, she did not know, but when she later woke up, at about 7:00 a.m., it was his tent and he was there, without a shirt, with no one else present. He looked hung over, but gave her a smile.
- [18] F.B. described grabbing her pants and putting them back on. She also grabbed her wallet and phone. She ran out and went to a grocery store and called a cab. F.B. initially asked the cab driver to take her to the hospital, but told Cst. Lord that she went into a "state of psychosis", and so asked the driver to take her home because she did not feel safe or supported enough to go to the hospital. Once at her residence, F.B.'s roommate tried to calm her down, and called J.K., who came over. F.B. then told the two of them what had happened.
- [19] F.B. told Cst. Lord that she and J.K. went to the hospital on October 21, 2022, where she was examined by a forensic nurse. F.B. brought with her the pants and underwear she had been wearing on the night of the incident, which she had kept unwashed in a bag.
- [20] Turning next to the evidence that the Crown seeks to have admitted on this application, early on in her interview F.B. volunteered that she had been a lesbian for 25 years, "[s]o there was no form of consent that would have ever happened here". When Cst. Lord later returned to this topic, stating that F.B. had said that she had been a lesbian for 20 plus years, F.B. said that she came out of the closet when she was 14, and last had consensual sex with a man at age 18. It is unclear how old F.B. was at the time of the interview, because the transcript redacts her age.

- [21] Consistent with F.B.'s statement to Cst. Lord that she last had consensual sex with a man at age 18, it is implicit and anticipated that at trial F.B. will testify that she only had sex with Mr. Frenchy on this one occasion, and did not have sex with him on any prior or subsequent occasion.
- [22] The Crown also intends to lead DNA evidence on the issue of identity. This evidence originates from the completed SANE kit for F.B., which included a swab from her vagina and another swab from the underwear she brought to the hospital.
- [23] Laboratory testing revealed that the interior front middle gusset of the underwear yielded a mixed DNA profile from two individuals, a male and a female. The male DNA profile matched Mr. Frenchy's known DNA profile, and the female DNA profile matched F.B.'s known DNA profile.
- [24] The vaginal swab also yielded a mixed DNA profile from one male and one female. The partial profile of the male component matched Mr. Frenchy's known DNA profile, while the female DNA profile matched F.B.'s known DNA profile.

Legal Principles

- [25] At common law, Crown evidence of a complainant's other sexual activity is presumptively inadmissible: Kinamore at para. 33. By "other sexual activity", I mean sexual activity other than the sexual activity that forms the subject matter of the charge.
- [26] The term "sexual activity" encompasses evidence of sexual inactivity, which is therefore subject to the rule of presumptive inadmissibility: Kinamore at paras. 64-80. Kinamore defines evidence of "sexual inactivity" as follows:
- [64] 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.
- [27] The common law rule making evidence of other sexual activity 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, the complainant is: (a) more likely to have consented to the sexual activity forming the subject-matter of the charge; and (b) less worthy of belief. See Kinamore at para. 36.

- [28] The rule of presumptive inadmissibility also avoids the fact-finder evoking other discriminatory myths and stereotypes about sexual assaults, some of which may be harmful to the accused and so hold the potential to negatively impact trial fairness from the defence perspective: Kinamore at para. 37.
- [29] On the other hand, evidence of other sexual activity is not categorically excluded. Rather, it is only excluded to eliminate discriminatory lines of reasoning, hence the rule of presumptive as opposed to absolute inadmissibility: Kinamore at paras. 81-82. Ultimately, the rule 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.
- [30] 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 here. See Kinamore at para. 38.
- [31] 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 of the Criminal Code, R.S.C. 1985, c. C-46 and its associated provisions: Kinamore at para. 43. This process has two stages.
- [32] At stage one, the Crown must establish, among other things, that the evidence of other sexual activity is capable of being admissible. The evidence will be incapable of being admissible where the proposed use engages prohibited myth-based reasoning. In practical terms, the stage one threshold will usually be met if relevance is established. See Kinamore at paras. 45-49, 55; *R. v. Comin*, 2022 BCSC 530 at para. 61; *R. v. A.R.*, 2024 BCSC 2644 at paras. 17, 20 & 28.
- [33] Stage two of the Kinamore process determines whether the evidence of other sexual activity is actually admissible. This requires that the court decide whether the Crown has proven on a balance of probabilities that the probative value of the evidence is not outweighed by its prejudicial effect. See Kinamore at para. 52.
- [34] Probative value relates to the degree or extent of relevance that evidence holds with respect to trial issues, including the strength of any inferences that can be drawn from the evidence: *R. v. Schneider*, 2022 SCC 34 at para. 60.
- [35] Prejudicial effect often focuses on the likelihood that a jury will misuse the evidence, but can also arise where the evidence may distract a jury from the real issues or consume an undue amount of time: *Schneider* at para. 60; *R. v. Mohammdouh*, 2024 BCSC 2096 at para. 19; Paciocco et al., *The Law of Evidence*, 8th ed., 2020, pp. 52-53, §5:3 (The Concept of Prejudice). In assessing prejudice, the court must consider the extent to which instructions can effectively equip the jury with an understanding of how to use the evidence properly:

Schneider at paras. 59, 61.

- [36] Weighing probative value against prejudicial effect has been described as a cost-benefit analysis: Schneider at para. 60. That said, probative value and prejudicial effect operate on different planes. Probative value goes to proof of an issue, whereas prejudicial effect goes to the fairness of the trial. As probative value advances, prejudice does not necessarily retreat. Nonetheless, probative value and prejudice pull in opposite directions on the admissibility issue, and their conflicting demands must be resolved through the weighing exercise. See *R. v. R.G.S.*, 2023 BCCA 52 at para. 51, quoting from *R. v. Handy*, 2002 SCC 56 at paras. 148-149.
- [37] In weighing the probative value of Crown-led evidence of a complainant's other sexual activity against its prejudicial effect, the court must consider the non-exhaustive list of factors set out in s. 276(3) of the Criminal Code, albeit keeping in mind that some of those factors have been articulated with defence-led evidence in mind: Kinamore at para. 40. 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.

Discussion

- [38] In this case, the evidence of other sexual activity is F.B.'s anticipated testimony that: (a) she has identified as a lesbian for about 25 years, since she was 14 years old; (b) she last had consensual sex with a male at age 18; (c) she would therefore not have consented to sex with Mr. Frenchy; and (d) she did not have sex with Mr. Frenchy either before or after the occasion that forms the subject matter of the charge.

- [39] In my reasons at stage one, I found that the evidence described at (a) to (c) in the previous paragraph falls within the definition of other sexual activity as set out in the case law, because it amounts to an implicit assertion that F.B. prefers not to engage in sexual activity with men. I therefore held that the evidence is presumptively inadmissible and thus subject to the Kinamore screening regime. See Frenchy at paras. 53-55.
- [40] In my stage-one reasons, I also found that this evidence of other sexual activity was relevant to both whether F.B. was capable of consenting and whether she did, in fact, consent, matters that are "inextricably joined": Frenchy at para. 50, citing *R. v. Rioux*, 2025 SCC 34 at para. 66. The evidence was therefore reasonably capable of being admissible at trial.
- [41] I reached this conclusion because to prove sexual assault the Crown must establish that the complainant did not consent to the alleged sexual activity. Here, F.B.'s statement indicates that her memory of the start of her sexual encounter with Mr. Frenchy is at least significantly impaired, and probably entirely absent. The Crown is therefore unable to lead direct evidence as to whether F.B. consented to this sexual activity or was capable of doing so. See Frenchy at para. 60.
- [42] Where direct evidence is unavailable on the issues of consent and capacity to consent, circumstantial evidence can be relevant and admissible to help determine these issues. As I stated in my earlier reasons:
- [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.
- [43] Based on the just-mentioned jurisprudence, in my stage-one reasons I thus concluded that the evidence in question was properly relevant as circumstantial evidence to help the Crown to prove that F.B. did not consent to having sex with Mr. Frenchy:
- [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.
- [44] Although not specifically addressed in my stage-one ruling, F.B.'s anticipated evidence that at the time of her police statement she had not had consensual sex with a man for a considerable time also carries relevance in rebutting any suggestion that Mr. Frenchy's DNA ended up on the vaginal swab and her underwear because she had sex with him on a different occasion. To be more precise, F.B.'s anticipated testimony that she did not have sex with Mr. Frenchy - consensual or otherwise - either before or after the incident that forms the subject matter of the charge is relevant to this issue. See *R. v. J.N.N.*, 2025 YKCA 11 at paras. 2-12, 23-28. The stage one threshold is therefore also met with respect to this use of the evidence.
- [45] Given my ruling at stage one, the question before me now is not whether the evidence is relevant to a disputed issue at trial - I have already found that to be so in relation to the issues of consent and capacity to consent, and also with respect to the just-mentioned issue concerning DNA. Instead, I must assess whether the probative value of the evidence on these issues outweighs any attendant prejudicial impact.
- [46] In my view, the probative value of the evidence does outweigh its prejudicial effect, and the Crown has therefore met the stage-two test for admissibility.
- [47] I have come to this conclusion for four main reasons.
- [48] First, the probative force of a complainant's statement of sexual disinterest in an accused will depend, among other things, on its degree of specificity and its temporal proximity to the alleged assault: *Kinamore* at para. 85.
- [49] Here, F.B.'s anticipated testimony that she would not have consented to sex with Mr. Frenchy because of her long-standing preference for sex only with women, is both specific and temporally proximate to the alleged sexual assault. As a matter of logic, common sense and human experience, this evidence may carry material weight on the issues of consent and capacity to consent. The strength of the inference in relation to the disputed issues is more than slight or modest. There is thus a reasonable prospect that the evidence will assist the fact-finder in arriving at a just determination as to whether the Crown has proven its case.

- [50] I recognize that, as noted in the case law cited above, people do not always actually do what they say they would have done in a particular circumstance, especially when intoxicated: Frenchy at para. 62. This reality carries the potential to detract from the probative value of F.B.'s evidence about her sexual preferences, including in relation to Mr. Frenchy. But it does not result in that evidence having minimal probative value.
- [51] Mr. Frenchy argues that F.B.'s anticipated evidence nonetheless has little probative value because she made her statement to police over three years ago, and since that time may have had sex with men.
- [52] Yet, as already noted, the assessment of probative value tends to focus on temporal proximity to the alleged sexual assault, not to the trial. And at this point, there is no suggestion that F.B.'s statement is unreliable insofar as she was describing her sexual preferences around the time the incident occurred. It follows that the mere possibility that F.B.'s sexual preferences may have changed since making her statement to police does not materially undermine the probative value of the evidence on the issues in dispute.
- [53] Mr. Frenchy also contends that in her statement F.B. does not disclose whether other women were present at the time of the incident, which might explain her state of undress. In this respect, I note that the statement filed by the Crown for use at today's hearing indicates that one other woman may have been present when F.B. had her drink prior to blacking out. It also indicates that F.B. could not say whether she and the man who was penetrating her vagina were the only people in the tent during the time that she regained consciousness.
- [54] However, this defence argument is also unconvincing, because the presence of a woman, even if true, would not detract from the probative value of F.B.'s sexual orientation on the issue of whether she would have consented to a man penetrating her vagina from behind with his penis.
- [55] I also note that the suggestion that F.B. may have had sex with a woman that evening arguably amounts to evidence of other sexual activity. This evidence can therefore only be adduced if the defence obtains a ruling that either: (a) the evidence does not constitute other sexual activity; or (b) the evidence is nonetheless admissible under s. 276. No such application has been brought or even suggested. Parenthetically, I would add that if Mr. Frenchy intends to bring such an application he should do so well in advance of trial, and should promptly request that a case management conference be held in the near future to discuss associated filing deadlines and scheduling.

- [56] In Mr. Frenchy's written submissions on stage one, he further argues that Cst. Lord was the one who suggested that F.B. blacked out for a period of time, and that F.B. did not make clear whether she had blacked out, as opposed to whether she was simply unable to remember. Defence counsel made the same point in oral submissions today. The argument appears to be that F.B.'s evidence about her sexual preferences thus holds little probative value to any disputed trial issue.
- [57] However, Mr. Frenchy made his written argument in relation to the heavily-redacted statement filed by the Crown for stage one of the Kinamore application. At stage two, the Crown filed the same statement with almost no redactions. In that mostly-unredacted statement, it is clear that F.B., and not Cst. Lord, first suggested that she blacked out prior to the start of the sexual encounter.
- [58] As for F.B.'s anticipated testimony that she did not have sex with Mr. Frenchy either before or after the incident that forms the subject matter of the charge, this evidence carries a reasonable prospect of assisting the trier of fact in determining whether Mr. Frenchy's DNA could have ended up on F.B.'s vaginal area or underwear because they had sex on another occasion. Its probative value on this issue is more than minimal. I appreciate, however, that this probative value may dissipate if the defence makes a formal admission that excludes any reasonable possibility that the DNA may have been deposited at these locations at some other time.
- [59] My second reason for concluding that the probative value of F.B.'s evidence about her sexual preferences exceeds its prejudicial impact is that, contrary to the defence submission, I do not accept that at this stage factors such as F.B.'s intoxication or lack of recall materially detract from the probative value of her claim that given her sexual orientation she would not have consented to sex with Mr. Frenchy.
- [60] I appreciate that the defence may well cross-examine F.B. to attack the credibility or reliability of her evidence on this point. For example, in cross-examination defence counsel may properly challenge F.B.'s assertion that because of her sexual orientation she would not have had consensual sex with Mr. Frenchy, not even if her inhibitions were reduced by alcohol.
- [61] I also appreciate that assessing probative value may necessarily involve considering the credibility and reliability of the evidence in question. Examples that come to mind include assessing the possibility of witness tainting in the context of similar fact evidence, or assessing whether the credibility or reliability of the narrator of a hearsay statement is so deficient that it robs that statement of any potential probative value: *R. v. Hart*, 2014 SCC 52 at paras. 94-98; *R. v. Handy*, 2002 SCC 56 at para. 134.

- [62] However, while a judge can at times or to some extent consider credibility and reliability when assessing probative value, this consideration must respect the factfinder's role as the one ultimately responsible for weighing the evidence. The judge must therefore keep in mind that they are only deciding the threshold question of whether that evidence is worthy of being heard by the jury. See Hart at para. 98; R. v. Grant, 2015 SCC 9 at para. 46; The Law of Evidence at pp. 50-51.
- [63] In the circumstances here, there is no basis for me to conclude that F.B.'s credibility or reliability with respect to her anticipated evidence of sexual preference is so deficient as to justify not putting it before the trier of fact. For example, the defence has not pointed to any particular concerns about her credibility or reliability in this regard, such as a motive to lie, prior inconsistent statements, bad character, and so on.
- [64] It may be that, after cross-examination at trial, I determine that F.B.'s testimony as to whether she would have consented to sex with a man given her sexual preferences lacks credibility or reliability. But I have not been directed to any problems regarding the credibility or reliability of this evidence that would justify me excluding it in my gatekeeper role at this juncture.
- [65] A third reason why I have concluded that F.B.'s anticipated testimony about her sexual preferences is admissible at stage two of the Kinamore process is that this evidence does not raise any risk of prejudice that cannot be effectively countered by me self-instructing to avoid using it to support reasoning based on myth or stereotype. For example, I will self-instruct to avoid applying the general and therefore improper assumption that sexual orientation is an all-or-nothing proposition that remains static over a person's entire lifetime, so that a woman who identifies as a lesbian would never under any circumstance consent to sexual activity with a man.
- [66] Accordingly, I see no real risk that admitting this evidence will create prejudice so as to detract from Mr. Frenchy's ability to make full answer defence.
- [67] With respect to F.B.'s anticipated testimony that she did not have sex with Mr. Frenchy before or after the charged incident, there may be a potential risk of a factfinder using this evidence to infer that F.B. is therefore more likely not to have consented to having sex with him on that occasion. But I am confident that I can avoid this type of stereotypical reasoning by means of a self-instruction.
- [68] My fourth and final reason for finding the evidence in question to be admissible is that there is no risk of other types of prejudice arising from the evidence.
- [69] F.B. appears to be comfortable in her self-identification as a lesbian, having told the Crown that it is core to her identity, and she favours this information being led as part of the Crown case. Admitting the evidence will therefore not run contrary to society's interest in encouraging the reporting of sexual assault offences. The same goes for her anticipated evidence about not having had sex with Mr. Frenchy on any other occasion.

[70] Nor will admitting the evidence detract from F.B.'s personal dignity or security, or her rights to privacy or the full protection and benefit of the law. To the contrary, in the circumstances of this case excluding the evidence risks undermining or denying her these things.

Conclusion

- [71] The probative value of F.B.'s anticipated testimony on the matters I have discussed outweighs its potential prejudicial effect, which I am confident can be eliminated by means of a self-instruction. Accordingly, this evidence meets stage two of the Kinamore test and is admissible at trial.
- [72] If the Crown leads this evidence at trial, the defence will be permitted to challenge it in cross-examination. That challenge can include questions about whether, despite her professed sexual orientation, F.B. might nevertheless have consented to having sexual intercourse with a man while in an intoxicated state on the night in question.
- [73] However, I am not making a more specific ruling about the precise scope of the permissible defence cross-examination at this point. Generally speaking, it is more appropriate to do so if a particular objection arises during cross-examination at trial. In that event, I will know the exact question being asked and the objection to it, and will be able to assess the propriety of that question in the context of F.B.'s testimony in chief and any cross-examination that has occurred up to that point.
- [74] Given that I have ruled the evidence admissible, there will not be a Kinamore publication ban on these reasons, and in addition the Kinamore publication ban on my stage-one reasons is hereby removed.

"D. Layton J."

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