

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HIS MAJESTY THE KING

- and -

OLIVER WEYALLON

RULING ON MISTRIAL APPLICATION
of the
HONOURABLE JUDGE ROBERT GORIN

Restriction on Publication

This decision is subject to a ban on publication pursuant to s. 486.4 CC with respect to the name of the victim as well as information that may identify this person. Some details may have been edited to ensure that the victim may not be identified.

Heard at: Yellowknife, Northwest Territories

Date of Decision: March 30, 2026

Counsel for the Crown: Jean-Benoit Deschamps

Counsel for the Accused: Robert LaValley

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INTRODUCTION

[1] Oliver Weyallon is charged with sexually assaulting the complainant, “N”, contrary to s. 271 of the *Criminal Code*. I found him guilty of the offence on July 17 of last year. His new lawyer, Mr. LaValley, asks that I declare a mistrial on the basis of ineffective counsel. In his written and oral submissions, he argues among other things, that Mr. Weyallon’s former lawyer failed to adequately seek his instructions on his election of mode of trial, that she failed to utilize text messages provided to her by the accused, and that she failed to adequately cross-examine N on substantial inconsistencies between her testimony and statements she had previously made to the police.

[2] The Crown opposes the accused’s application. He argues that the deficiencies the accused refers to are so minor that they do not meet the required threshold to declare a mistrial.

[3] For the reasons that follow, I have granted Mr. Weyallon’s application for a mistrial.

ANALYSIS

Legal Test

[4] Mr. LaValley on behalf of Mr. Weyallon argues that the test I must apply is that which has been set out by the Alberta Court of Appeal in cases such as *R. v. Sauverwald*, 2020 ABCA 388. In *Sauverwald*, the court set out the overarching test that applies to *appeals* based on ineffective counsel. At paragraph 15, the court noted that there was a three-part burden on an appellant who claimed ineffective representation at a criminal trial. The court reviewed its own previous jurisprudence stating at paragraph 15.

. . . Those cases set out the three-part burden on an appellant who claims ineffective representation at a criminal trial. The parts involve the appellant having to prove three things: (a) the facts on which the claim of incompetence is based; (b) that the representation provided by trial counsel was incompetent; and (c) that the incompetent representation resulted in a miscarriage of justice.

[5] While *Sauverwald* was a case which was being decided at the appellate level, it was, in fact a review of the trial judge’s refusal to declare a mistrial. At the trial level ¹, Antonio J. had expressed the threshold as:

[32] A “reasonable possibility” of miscarriage lies somewhere between a mere possibility and a likelihood: *R v Dunbar* at para 26; *R v Yellowhead*, 2015 BCCA 389 at para 36; *R v Cheng* at para 19; *R v Joannis* at para 82. The threshold has also been described as one of “reasonable probability” or a “balance of probabilities”: *R v Dunbar* at paras 24, 26; *R v Cheng* at para 18; *R v Rhodes* at para 14. A reasonable possibility of prejudice or miscarriage is established when the reviewing court is satisfied that because of counsel’s incompetence, the verdict cannot be taken as a reliable assessment of the applicant’s culpability: *R v Dunbar* at para 26.

[6] Although the Court of Appeal ultimately overturned the trial judge and granted the appeal based on ineffective counsel, it did not find that the test applied by the trial judge was incorrect. To the contrary, it stated:

[115] The trial judge set out the law as to counsel ineffectiveness in an able way at paras 28 to 33 of her mistrial reasons. But we are expected to apply the law independently. . .

[7] On the other hand, Mr. Dechamps in his written submissions argues:

¹ 2019 ABQB 482 (CanLii)

“At this stage of the proceedings, the court needs to look at the application **as a mistrial application and not as an ineffective assistance of counsel as a ground of appeal**. The standard for ineffective counsel is different if raised during a trial versus on appeal. If ineffective assistance of counsel is raised during the course of a trial, the approach should be analyzed using the same framework as a mistrial [see: *R. v. GC*, 2018 ONCA 392]. As the Ontario Court of Appeal mentioned:

[3] The appellant maintains that the trial judge erred in law by failing to apply the same standard as that used to assess claims for ineffective assistance of counsel on appeal. On appeal, the test focusses on whether there is a “reasonable possibility” that a miscarriage of justice resulted from ineffective assistance at trial: *R. v. Stark*, 2017 ONCA 148, 347 C.C.C. (3d) 73, at paras. 14-15. The test for a mistrial is different. The decision whether to grant a mistrial is a matter that lies within the discretion of the trial judge, “who must assess whether there is a real danger that trial fairness has been compromised”: *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823, at para. 79.

[4] We disagree that the same test to assess ineffective assistance claims on appeal should apply at trial. An incompetence of counsel claim, brought during the course of a trial, should be approached within the principled framework for mistrial applications. Bearing in mind the unique dynamics of each trial, judges need to be left with a broad discretion to manage the trial process. A mistrial is a remedy of last resort, and it falls squarely within the discretion of the trial judge who is in the best position to assess whether such a remedy is needed in order to avoid miscarriages of justice. No new test is required.

This approach [h]as been adopted by courts across the country [see: *R. v. BN*, 2025 AKB 535, *R. v. Price*, 2022 NLSC 24, *Leoni c. R.*, 2023 QCCQ 7214]. Therefore, the test at the trial stage is whether the ineffective[ness] of counsel is such that a mistrial is needed where there is a real danger of prejudice and/or to avoid an unfair trial. In contrast, the “reasonable possibility” test is used at the appeal level.”

[All emphases were added in the Crown’s written submissions]

[8] Mr. Deschamps submits that in determining whether to declare a mistrial based on ineffective counsel, this court must apply a different test than that which an appeal court would apply. He states that therefore this court should not ask itself whether there is a “reasonable possibility” that a miscarriage of justice resulted from ineffective assistance at trial. Rather the test he suggests that I should apply is whether there is “a real danger that trial fairness has been

compromised” through ineffective assistance; see *R. v. G.C.*, 2018 ONCA 392 at paras 3&4.

[9] As I will explain, the deficiencies in his former lawyer’s conduct of Mr. Weyallon’s defence are such that I find it appropriate to declare a mistrial regardless of which test I apply.

History of Proceedings

[10] Mr. Weyallon was first charged with sexually assaulting N on another information which was later withdrawn and replaced with the information presently before the court. The first information was sworn on July 5, 2025, and alleged a single count of sexual assault that was committed on January 24, 2024. N’s birthdate is January 17, 2008, and she would have just turned 16 years old a week prior to the alleged date. Her age at the time is important for several reasons. She would have had the capacity to consent to sexual activity with Mr. Weyallon, who was then 27 years old. On an indictable election, the maximum term of imprisonment for the offence alleged is 10 years. Consequently, Mr. Weyallon would have had the right to elect to be tried in the Supreme Court either by a judge and jury or judge alone, but no right to a preliminary inquiry.

[11] However on January 30, 2025, a second information was laid that alleged two counts of sexual assault – the second was ultimately stayed by the Crown – alleged to have occurred in December of 2024. On February 11, the accused appeared in court for the first time on the new charges. The original information was withdrawn, process was transferred to the new information, and the Crown elected to proceed by indictment.

[12] The actual dates charged on the new information were on or between December 15 and 25, 2024, and December 25, 2024. N would have been 15 during those dates and therefore not capable of consenting to sexual activity with Mr. Weyallon. The maximum prison term was now 14 years, and Mr. Weyallon therefore had the right to a preliminary inquiry.

[13] However, the Crown, defence counsel, and consequently the court were unaware of the increased maximum prison term or the availability of a preliminary inquiry. The Crown had not particularized the new charges to allege that N was under 16 years of age at the time. Neither were there charges of sexual interference with a person under the age of 16 years which typically accompany

charges of sexual assault, where the alleged victim is underage. As a result, it was impossible for anyone, including the court, to determine the degree of jeopardy Mr. Weyallon faced or this full procedural rights by examining the charges on the information.²

[14] *Moreover*, while the way the Crown had particularized the charges was within its discretion, the Crown had also redacted the complainant's date of birth from all of disclosure material provided to Mr. Weyallon's former lawyer. Consequently, even Mr. Deschamps was unaware of the complainant's age on the dates charged until relatively shortly before the trial.

[15] On March 19, 2025, Mr. Deschamps and defence counsel provided a case management conference report to the Territorial Court outlining the allegations against Mr. Weyallon in summary form. No mention was made of N's age at that time. On March 19, I presided over the case management conference and wrote a memorandum detailing what was said in the meeting. Two of the items noted at that time were that N was alleged to have been 16 at the time, and that the sole issue was whether there was consent to the sexual activity that occurred between N and Mr. Weyallon. It is very apparent that at the time of the case management conference neither Mr. Deschamps nor defence counsel were aware of the age of the complainant. I should acknowledge that this was not the fault of defence counsel.

[16] To be clear, as late as March 19, due to the way the charges against Mr. Weyallon were particularized and the redaction of the complainant's date of birth from Crown's disclosure material, Crown counsel, defence counsel, and as a consequence even the court, were operating under the assumption that N was 16 years old at the time of the allegations.

[17] It was shortly after on April 1, 2025, that Mr. Weyallon elected to be tried in the Territorial Court through an agent who appeared for Mr. Weyallon and defence counsel, who had filed Mr. Weyallon's designation for her to appear on his behalf. Neither he nor his lawyer were aware of the age of the complainant at the time of the alleged offences. The trial date was set to July 16 & 17, 2025.

² The Crown's practice appears to be not to particularize sexual charges to allege that the complainant was under 16 years of age in cases of sexual assault. This practice can be contrasted with that which typically applies to other offences such as theft, mischief, etc. that carry different penalties and procedures depending on their value or nature. These offences are almost invariably particularized so that applicable punishments and procedural rights are readily apparent.

[18] It was not until May 13th, that Mr. Deschamps, who had now become aware of N's age, advised defence counsel, among other things, that N "was only 15 at the time". As noted, this was after Mr. Weyallon had elected to be tried in the Territorial Court. This Court had to wait to the date of trial before being so apprised.

[19] It is very unfortunate that Mr. Weyallon's former counsel did not keep notes of her meetings with Mr. Weyallon. Much of her testimony on what happened between them was based on what she supposed had happened based on her usual practice. She frequently used the words "I would have" when stating what had been done or discussed. She did not memorialize her discussions with Mr. Weyallon in any meaningful manner, other than in the texts or emails between them, or time sheets or account details she provided to Legal Aid when rendering accounts. From those details, it appears that on January 27, 2025, she discussed the present charges and procedural option with Mr. Weyallon, who wished to think about it. She noted that the matter would be put over for two weeks. She recalls that when she discussed the election on mode of trial with Mr. Weyallon, she left the decision completely to him. The only information she recalled providing to him was that a Territorial Court trial would be faster. At this time, the new set of charges had not been laid.

[20] In determining what defence counsel did or did not discuss with Mr. Weyallon, I have given very little weight to her evidence on what she "would have" said to him on certain occasions, where unsupported by notes or other documentation. It seemed to me that much of what she said when using those words was based on supposition. I also have given very little weight to her evidence of her vague or faint recollections.

Election of Mode of Trial

[21] Based on the evidence, I find Mr. Weyallon's lawyer appears not to have asked Mr. Weyallon if he wished to re-elect based on the changes in jeopardy and procedural rights that had occurred after she was made aware of them. To a large extent Mr. Weyallon created a problem by being non-responsive to former counsel's emails and meeting late with her. Indeed, even on the day of trial I stood down the commencement of his trial from 9:30 a.m. to 11:30 a.m. to give former counsel further opportunity to speak with him, given the lack of opportunity she had had to meet with him earlier due to his irresponsible behaviour. It is true that to some extent she was under significant pressure due to her client's inattention.

However, it also seems that the possibility may not have occurred to her. Moreover, under the circumstances she could have requested an adjournment and would certainly have received one since this was the first time the matter had been set for trial.

[22] I find that the failure to advise Mr. Weyallon of the possibility of attempting to re-elect is alone sufficient to justify a mistrial. Under the circumstances, the application would have been granted. S. 11(f) of the Charter guarantees the right to a jury trial where, in as in the present case, the maximum punishment is imprisonment for five years or more. In order to determine if they wish to exercise that right the accused must be fully informed of all the factors at play. They need to know the jeopardy they face, the defences available to them, and whether a preliminary inquiry would be available if they elected for a jury. Crucially, under the present circumstances, counsel should have made Mr. Weyallon aware that he could at least apply to re-elect.

[23] I also note that s. 536(2) of the Criminal Code of Canada requires:

(2) If an accused is before a justice, charged with an indictable offence that is punishable by 14 years or more of imprisonment, other than an offence listed in section 469, the justice shall, after the information has been read to the accused, put the accused to an election in the following words:

You have the option to elect to be tried by a provincial court judge without a jury and without having had a preliminary inquiry; or you may elect to be tried by a judge without a jury; or you may elect to be tried by a court composed of a judge and jury. If you do not elect now, you are deemed to have elected to be tried by a court composed of a judge and jury. If you elect to be tried by a judge without a jury or by a court composed of a judge and jury or if you are deemed to have elected to be tried by a court composed of a judge and jury, you will have a preliminary inquiry only if you or the prosecutor requests one. How do you elect to be tried?

In this respect s. 536(2) differs from s. 536(2.1) which applies to indictable offences – other than indictable offences over which the Territorial Court has “absolute jurisdiction – that do not carry a maximum penalty of 14 years or more. S. 536(2.1) requires the same recital, minus the references to the right to a preliminary inquiry in the case of a superior court election. It appears that in enacting the present version of s. 536(2), parliament felt it important to ensure not only that the accused be made aware of their right to elect the various modes of trial available, but also their right to a preliminary inquiry where their election permits it.

[24] However, at no time did the court ever conduct recital set out in s. 536(2). It was never put to Mr. Weyallon, since he was not present, and counsel never stated that he was waiving the need for it. On the date of the election to Territorial Court another lawyer appeared as agent for Mr. Weyallon's lawyer. Mr. Weyallon was also not present and the lawyer appeared for him as well pursuant to a designation of counsel signed by Mr. Weyallon and filed with the court by his lawyer. The lawyer appearing as agent indicated that he was electing to be tried in the Territorial Court and the pleas were not guilty. The election was recorded and a trial date was set. Somehow through oversight, the not guilty plea was not recorded by an endorsement on the information. The matter was adjourned to May 6, then May 27 and then to June 3 at which time the not guilty pleas were again entered and recorded and the matter went over to the trial date with no further interim dates. On none of these occasions was either Mr. Weyallon or his lawyer present. On each occasion, different lawyers appeared as agent for Mr. Weyallon's lawyer and on behalf of Mr. Weyallon.

[25] It is well established that an accused or his lawyer may waive the recital set out in s. 536(2). However, it appears equally established that in order for the waiver to be valid, it must be "clear, unequivocal, and informed"; see: *R v Geszthelyi*, 1977 CanLII 1921 (BC CA), 33 CCC (2d) 543 (BCCA), *per* Seaton J; *R v Danchella*, 1985 CanLII 639 (BC CA), 33 CCC (2d) 543, *per* Craig JA; *R v George*, 2016 BCCA 229 (CanLII), 33 CCC (2d) 543 (BCCA), *per* Lowry JA, at para 4; *Korponay v Canada (Attorney General)*, 1982 CanLII 12 (SCC), [1982] 1 SCR 41, *per* Lamer J; *R v Mitchell*, 1997 CanLII 6321 (ON CA), 121 CCC (3d) 139, *per* Doherty JA; *R v Vuong*, 2010 ONCA 798 (CanLII), 264 CCC (3d) 39, *per* Sharpe JA.³ In the present case, no one indicated that the accused was waiving that recital. No waiver was put on the record by the accused, his counsel, or any of the other lawyers who appeared on their behalf. In my view, this alone is enough to call into question the validity of his election to be tried in the Territorial Court.

[26] I agree with Mr. Deschamps that it is the right to a jury trial that is enshrined in the Charter and not the right to a preliminary inquiry. However, I disagree with him that because Mr. Weyallon had previously opted for a trial in the Territorial Court, the fact that it later became apparent – or should have become apparent – to his lawyer and him that a preliminary inquiry was available, is immaterial. To the contrary, the availability of a preliminary inquiry would certainly have been

³ Peter Dostal, *Criminal Law Notebook*, (criminalnotebook.ca) at "Defence Election".

something for him to consider when making a fully informed decision on how to elect. As I have said, for the election to be valid the accused must be fully informed of all the factors engaged, including the maximum (and minimum) punishments, and whether a preliminary inquiry is present. They should also be advised that they can apply to re-elect - where the time period for re-electing as of right has expired. Had the accused made that application I would unquestionably have granted it given the change in circumstances.

[27] In my view, prior counsel's failure to again seek his instructions on a possible re-election amounted to ineffective representation and is sufficient to declare a mistrial. In electing to be tried in the Territorial Court, he essentially waived his s. 11(f) Charter right to a jury trial. Yet the election he made was not fully informed. Applying the test urged by Mr. Deschamps, that alone not only presents "*a real danger that trial fairness has been compromised*". It compromises trial fairness in and of itself.

[28] Alternatively, I find that there is more than a *reasonable possibility* that there was a miscarriage of justice. Rather, I find that indeed the "*incompetent representation resulted in a miscarriage of justice*". By way of illustration, in the case of *Kameemalik and Qayootinuaq v. R.*, (N.W.T.C.A), [1994] N.W.T.J. No. 3, the Court of Appeal found that the trial judge had wrongly deprived the accused of their right to a jury trial. The court declined to apply the curative proviso set out in s. 686(1)(b)(ii) of the Code, which allows the court to dismiss an appeal in the case of a legitimate ground of appeal that might otherwise be decided in favour of the appellant, if "it is of the opinion that no substantial wrong or miscarriage of justice has occurred". The court stated:

8 Given the fundamental right involved in this case, we cannot give effect to the Crown's contention that s. 686(1)(b)(ii) should be invoked to cure a harmless error.

While not precisely on point, this decision demonstrates that the denial of a fundamental procedural right can, on its own, amount to a miscarriage of justice.⁴ I find that the absence of an informed election on Mr. Weyallon's mode of trial amounted to such a miscarriage – and as I have said, a compromise of trial fairness.

CONCLUSION

⁴ See also: *R. v. Krieger*, [2006] 2 S.C.R. 501, 2006 SCC 47 at para 22.

[29] I have found that counsel not seeking instructions on whether to apply to re-elect amounted to ineffective assistance that should result in a mistrial. However, I would be remiss if I did not once again note that to a significant extent, Mr. Weyallon's own neglect may well have significantly contributed to the problem. It is clear to me that he was a difficult client when it came to staying in touch with his lawyer and providing timely instructions. That said, I am satisfied that Mr. Weyallon's previous counsel should have done more.

[30] Since I have found that the failure to seek instructions on re-election to be dispositive of the outcome of this matter, I need not deal with the other arguments raised by Mr. LaValley. Certainly, second guessing why a lawyer did or did not do certain things during a trial, such as cross examining a witness on prior inconsistencies, can be a problematic exercise. Cross examining on very minor inconsistencies can be pointless and even counterproductive. Yet given some of the inconsistencies pointed out by Mr. LaValley, I am surprised that they were not pursued. Furthermore, the difficulty with Mr. Weyallon's late disclosure of the text messages between himself and the complainant, could have been remedied through an adjournment.

[31] However, I will also say that I am disturbed by former counsel's lack of adequate note taking when interacting with Mr. Weyallon. I am equally disturbed with her failure to turn over some of the limited materials she had to Mr. LaValley, when, as Mr. Weyallon's new counsel on this matter, he requested them.

[32] I thank both counsel for their assistance.

Robert David Gorin
Judge of the Territorial Court

Dated at Yellowknife, Northwest Territories
this 3rd day of April 2026

Counsel for the Crown: Jean-Benoit Deschamps
Counsel for the Accused: Robert LaValley

R v Weyallon, 2026 NWTTC 1

Date: 2026 04 03

Docket: T-1-CR-2025-000214

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