



MCM #128

Presented by: Wightman. Mack. Miles

24 FEB 2022

RUN IT – PART 2

THE MISSING WITNESS

MCM #128
Run It – Part 2
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Assistant Crown Attorney
February 24, 2022

STEP 1 – TAKE A BREATH

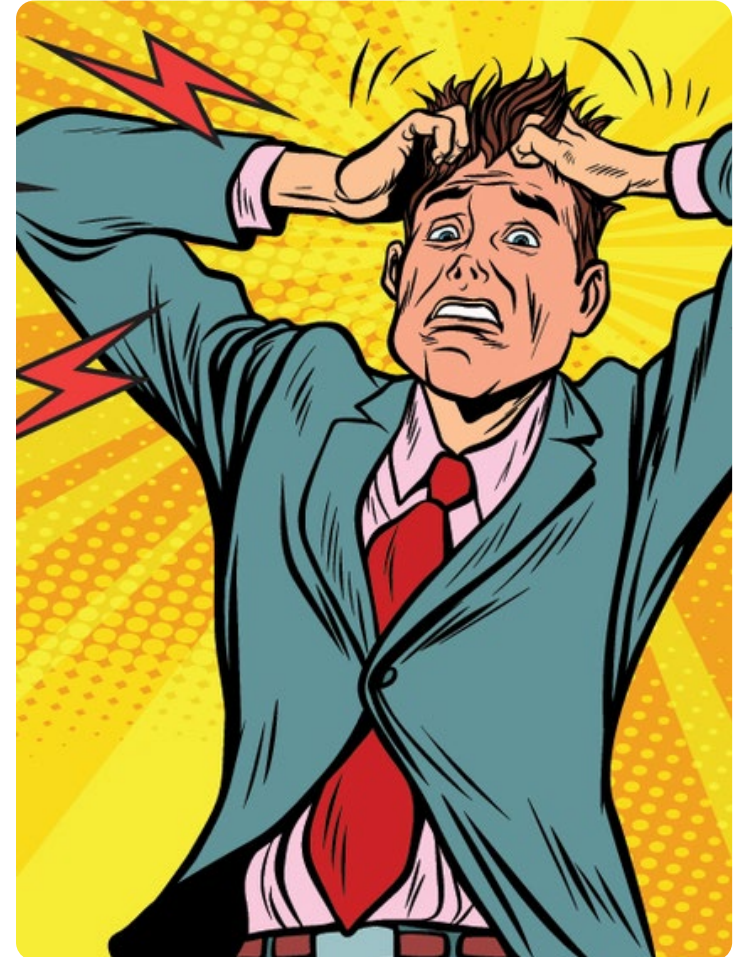
**THERE ARE
OPTIONS
AVAILABLE TO
SOLVE THE
PROBLEM**



Don't suffer more in imagination than in reality

1. Has someone gotten to this witness? Threats, persuasion?
2. Is this kid now off-side?
3. Will I have to 9(2) him? Will I have to make a hearsay application?

YOUR GOAL AT THIS POINT IS GETTING THE WITNESS TO THE COURTROOM



PIVOT

| | |
|----------------|---|
| Page | Have your witness paged on the record |
| Start | Start calling other evidence |
| Other evidence | Motive, Scene officers (recovery of the knife), Ident officers, medical evidence. |



GET YOUR INVESTIGATOR WORKING

- 1. School – SRO, School Principal**
- 2. Parents**
- 3. Other friends in the group**



Be mindful of...

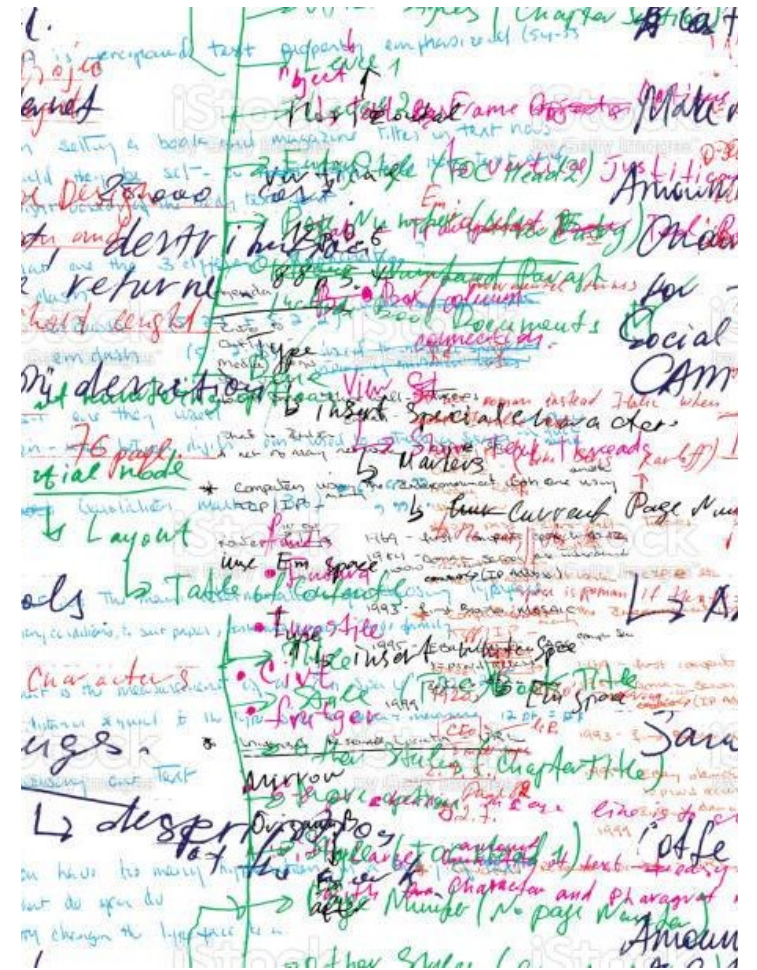
Impact of sending a marked cruiser to school
Do other youths know he's a witness?

Do William's parents know he's a witness?
Discreet efforts (to the extent they are possible) likely to keep the witness on-side.



Instruct your officer to document her/his efforts (Notes and IA)

1. Explain why this is important – a future application may require the officer to testify (adjournment, witness warrant, hearsay)
2. The officer will likely require notes / IA to refresh memory if testifying
3. Crown disclosure obligations still apply.



You found him but he can't come

ADJOURNMENT

R v Darville, [1956] SCJ No. 82.

1. The witness is material
2. The applicant is not guilty of any neglect in procuring the witness' attendance at trial
3. There is a reasonable expectation that the witness can be procured to attend on a future date.

CALL YOUR INVESTIGATING OFFICER ON ALL THREE



WITNESS WARRANT

Warrant if witness does not attend

705 (1) If a person who has been ***served with a subpoena to give evidence*** in a proceeding ***does not attend or remain in attendance***, the court, judge, justice or provincial court judge before whom that person was required to attend ***may issue*** a warrant in Form 17 ***for the arrest of that person*** if it is established

- (a) that the subpoena has been served in accordance with this Part, and
- (b) that the person is likely to give material evidence.

BY ADMISSION OR THROUGH INVESTIGATING OFFICER



WITNESS WARRANT = AUTHORITY TO ARREST

s.705 (1) is discretionary – “may issue a warrant...”

s.705(2) Warrant Effective throughout Canada

s.706 deals with release of witness arrested pursuant to warrant

Use this option after **all other efforts have failed**

If the witness warrant is issued, it goes on CPIC

Make sure your IO continues to check

If arrested outside the jurisdiction, talk to management. Getting

the witness back will involve some logistics (AND COSTS)





WHAT
WOULD

~~BEYONCÉ~~

WIGHTMAN

DO?

Piece it Together

Missing witness

Missing evidence

Unreliable witness

Hurdles



MCM: Run it!

The Message



As a Trial Crown your
focus should be
running the trial



There will be issues,
sometimes
complicated ones



Your job:
Solve them



Piece it together
Run it!



MISSING WITNESS



MCM: Run It!

Missing Witness: Facts and Issue

- Facts

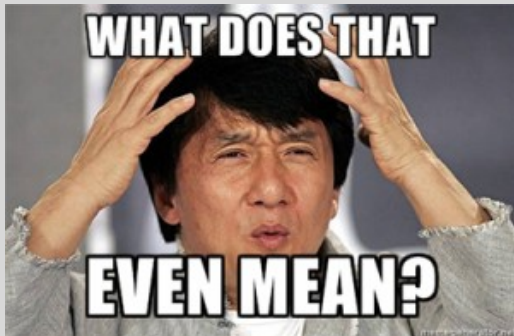
- A and complainant were at a motel
- There were children there with them – the oldest of which was 6 years old
- The A began to assault the complainant inside the motel room – the complainant had enough and decided to leave
- While she was outside packing her belongings the A threw a plate at her and hit her

- Issue

- Complainant is no show on day of trial – no ability to track her down
- No statement from complainant that would be admissible
- Crown position at screening was 30 days – A had serious CR and children were present at time of assaults
- 810 offered

Missing Evidence: Solution, Result and Lesson

- Solution
 - *First*, speak to someone
 - *Second*, identify other evidence
 - *Third*, amend the Information to “a person”
- Results
 - TJ wrongfully acquitted
 - Unknown reasons for the fight
 - Possible that one of the children threw the plate



- Lesson
 - *First*, speak to someone – talk it out
 - *Second*, piece it together
 - *Third*, run it!



UNRELIABLE WITNESS



MCM: Run It!

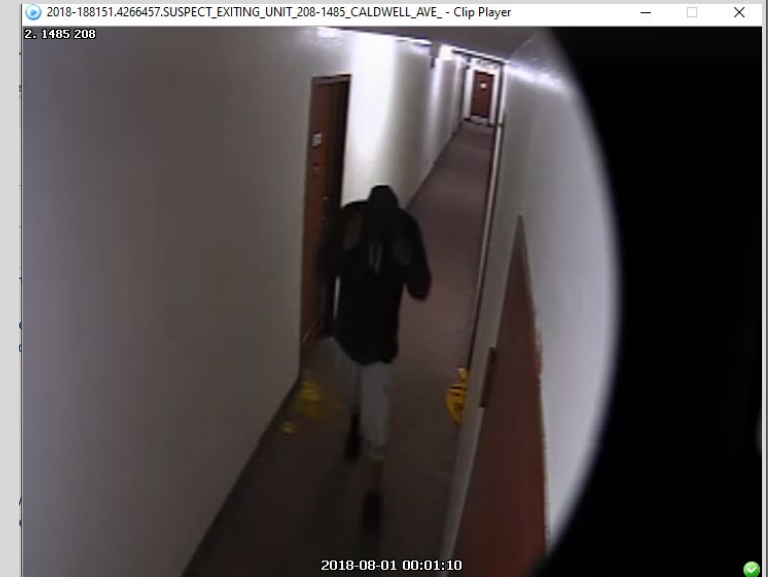
Missing Witness: Facts and Issue

- Facts

- A was charged with firearm related offences
- A was seen leaving known drug house at midnight in 30+ degree weather wearing a hoodie
- Arresting officer had past knowledge of unit and was investigating it
- Two officers, who had that house under surveillance, approach A who is getting in Uber
- Initially A provides his licence and name
- Officer1 asserts he formed grounds for arrest (evidence not solid on this point) due in part of odour of marijuana
- A flees during SITA – police chase – A discards earbuds and gun – A caught – DNA on earbuds
- At trial A alleges *Charter* violation in relation to detention and RTC at time of detention

- Issue

- During prep Crown has concerns about credibility of officer and grounds for detention
- During trial things get worse – real concerns officer may not be credible on certain points



Missing Evidence: Solution, Result and Lesson

- Solution
 - Build case around (i) objective evidence including surveillance footage; (ii) evidence of officer2 on scene and (iii) only evidence from officer1 that is corroborated by officer2
 - Argue lawful detention and lawful arrest – argue 24(2)
- Result
 - TJ found RS to justify stop and detention – but breaches re 10(a) and (b) and no grounds for arrest
 - TJ excluded ID evidence from stop but admitted discarded evidence
 - TJ convicted the A
- Lesson
 - *First*, speak to someone – get advice and guidance
 - *Second*, piece it together
 - *Third*, run it!



MISSING EVIDENCE



MCM: Run it!

Missing Evidence: Facts and Issue

- Facts

- Police execute SW in a residence looking for a gun
- They find one
- The accused is arrested and charged with
 - Possession of a firearm
 - s.117.01 breach or prohibition order

- Issue

- On the day before trial the trial Crown (not at fault for the issue) realized the Prohibition Order was missing – without it the s.117.01 charge would not be made out
- The A had previously been wrongfully acquitted – someone did not want to see that happen again

Missing Evidence: Solution, Result and Lesson

- Solution

- *First*, find out where the Order is
- *Second*, ask the I/O to get the Order
- *Third*, the I/O gets a fellow officer in TO to get a certified copy of the Order from the TO Courthouse
- *Fourth*, that TO officer takes the Order to Pearson
- *Fifth*, a pilot brings the Order to Ottawa on his flight
- *Sixth*, patrol officers wait at Ottawa airport to pick up Order from pilot



Result

When d/c found out the Order was en route from airport he conceded

Lesson

First, it is never too late to try and run something down

Second, piece it together

Third, run it!



HURDLES



MCM: Run It!

Hurdles: Facts and Issues

- Facts

- Two A charged in relation to beating and killing
- Offence involved two separate attacks (i) one inside a bar, where A1 beat the victim, smashing his head into a bar repeatedly and (ii) one outside the bar, where A2 punched the victim in the face – the victim died later in the hospital
- A1 charged with murder | A2 charged with manslaughter

- Issues

- Complicated causation issues including contradictory opinions on the cause of death
- ID issues re A2
- PH = A1 discharged of murder, committed on manslaughter | A2 discharged absolutely
- *Certiorari* = A1 committed on murder | A2 discharged upheld
- ONCA = A1 committed on murder | A2 committed on manslaughter

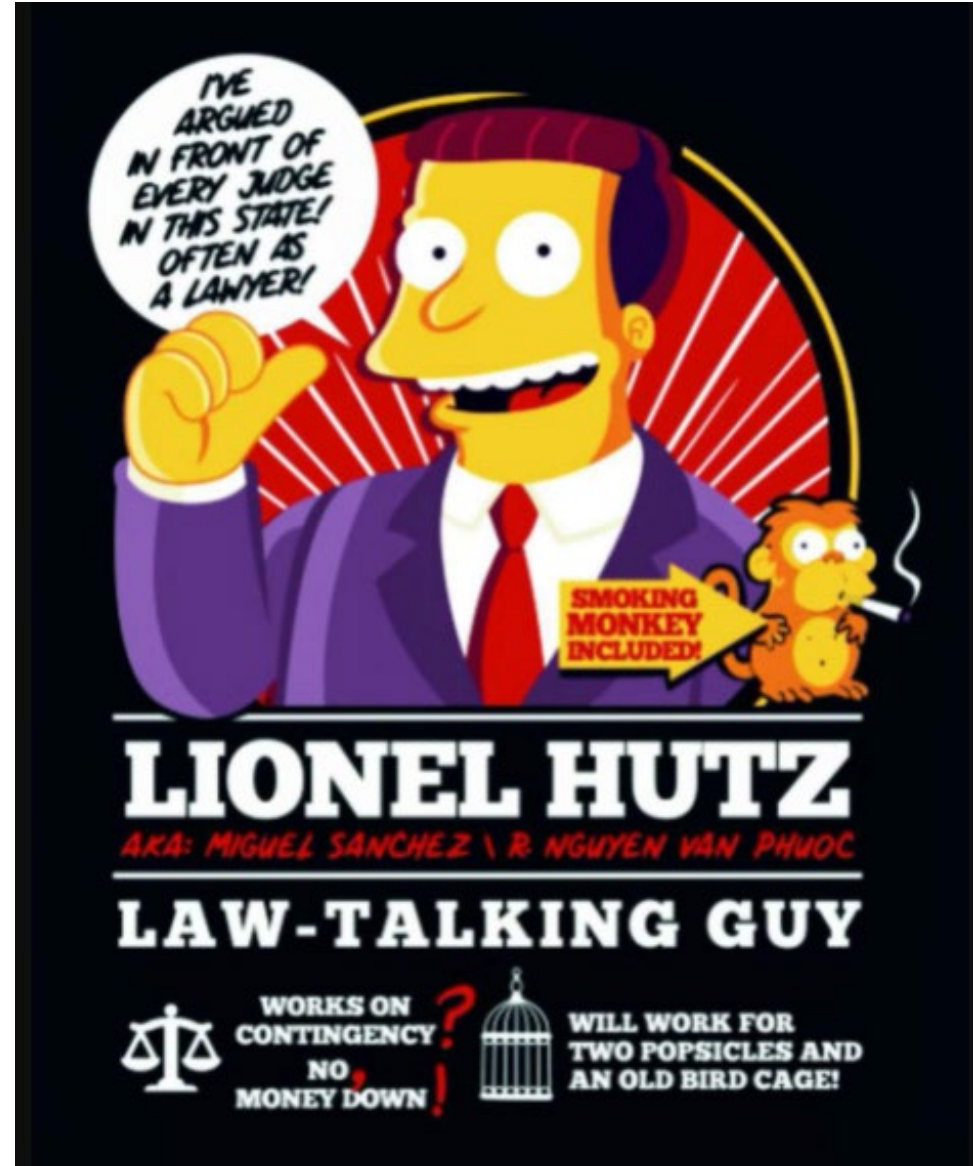
Hurdles: Solution, Result and Lesson

- Solution
 - Don't give up
 - Appeal
 - Find solutions to issues
 - Don't sleep
- Result
 - A1 convicted of murder | A2 convicted of ABH
 - ONCA later ordered new trial for A1 and 11(b) stay for A2
 - Victim's family named their new cat Dallas Mack
- Lesson
 - *First*, preserve
 - *Second*, get a cat named after you
 - *Third*, piece it together
 - *Fourth*, run it!



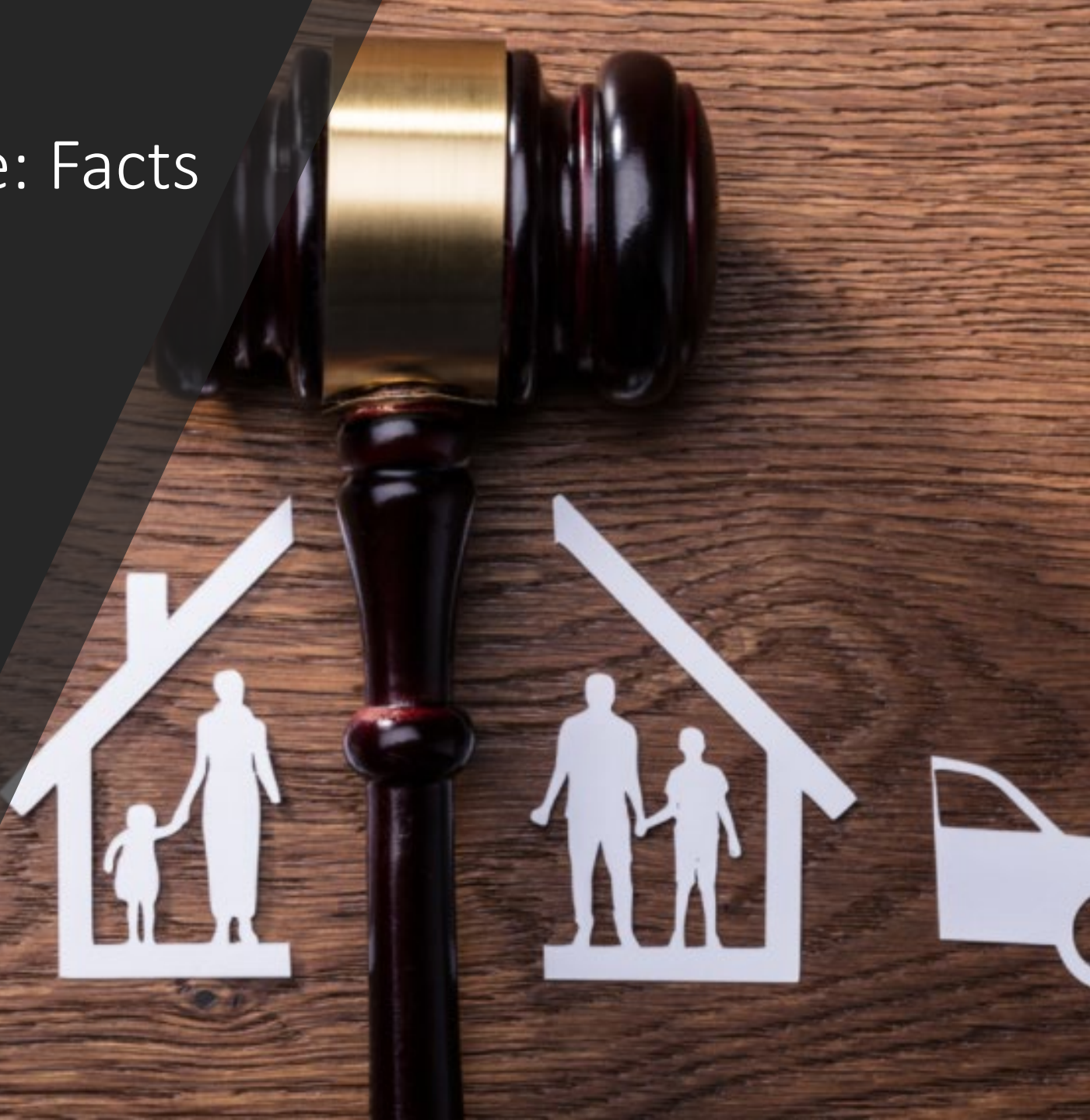
Dealing With Difficult Counsel (and victims, and well everyone, except you)

presented by: Lisa Miles



Intimate Partner Violence: Facts

- Chris and Paula married for several years and have 3 kids together
- Paula has assaulted, harassed and basically behaved very badly sometimes criminally following the breakdown of the relationship
- Criminal charges laid against Paula in midst of ongoing custody battle and divorce proceedings
- Defence counsel's conduct at the JPT was abhorrent
 - Yelling at the Crown
 - Threatening that this was going to get very ugly
 - Threatening that media was being notified
- Defence would only resolve for 810



Intimate Partner Violence: Trial

- Chris (victim) wanted trial to proceed
- Two of the children were subpoenaed to testify
 - 20ish yr old away at university
 - 15yr old very angry at father for having mom charged
- Trial set for 5 days
- Both Paula (accused) and Chris (victim)
 - Eager to get “their day in court”
- Crown concerns:
 - Strength of case
 - Impact on kids

