SCSL-04-15-T
(10490-10505)

8PECIAL COURT FOR SIERRA LEONE

OFFICE OF THE PROSECUTOR

FREETOWN – SIERRA LEONE

Before: Hon. Justice Benjamin Mutanga Itoe, Presiding Judge
Hon. Justice Bankole Thompson
Hon. Justice Pierre Boutet

Registrar: Mr. Robin Vincent

Date filed: 16 February 2005

THE PROSECUTOR

Against

ISSA HASSAN SESAY
MORRIS KALLON
AUGUSTINE GBAO
(Case No. SCSL – 2004 – 15 – T)

PROSECUTION CONSOLIDATED RESPONSE TO APPLICATION FOR LEAVE TO APPEAL – RULING (3RD FEBRUARY 2005) ON ORAL APPLICATION FOR THE EXCLUSION OF STATEMENTS OF WITNESS TF1-141 DATED RESPECTIVELY 9TH OCTOBER 2004, 19TH AND 20TH OF OCTOBER 2004 AND 10TH JANUARY 2005 BY ISSA HASSAN SESAY AND APPLICATION FOR LEAVE TO APPEAL RULING OF 3.2.05 FOLLOWING ORAL APPLICATION FOR EXCLUSION OF STATEMENTS OF TF1-141 DATED 9.10.04, 19 AND 20.10.04, 10.01.05 BY AUGUTINE GBAO

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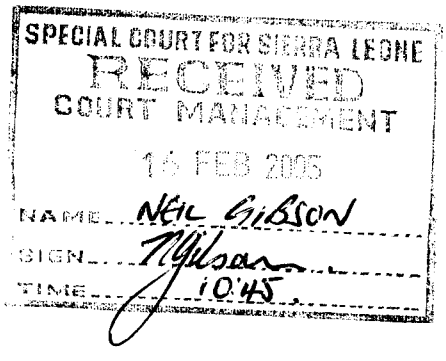

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I - INTRODUCTION

1. The Prosecution files this response to the "Application for Leave to Appeal – Ruling (3rd February 2005) on Oral Application for the Exclusion of Statements of Witness TF1-141 dated respectively 9th October 2004, 19th and 20th of October 2004 and 10th January 2005" dated 7 February 2005, on behalf of Issa Hassan Sesay ("Sesay") and to the "Application for Leave to Appeal Ruling of 3.2.05 Following Oral Application for Exclusion of Statements of TF1-141 dated 9.10.04, 19 and 20.10.04, 10.01.05" dated 8 February 2005, on behalf of Augustine Gbao ("Gbao").

2. On 18 January 2005, counsels for Sesay and Gbao made an Oral Application for the Exclusion of Statements of Witness TF1-141 dated 9 October 2004, 19 and 20 October 2004 and 10 January 2005. At the oral hearing Gbao made representations on the admissibility of the statements dated 9 October 2004 and 10 January 2005

only. Gbao's reference on the front page of the Application For Leave to Appeal to statements dated the 19 and 20 October 2004, appears to be an inadvertent error.

3. The Trial Chamber correctly concluded that the allegations in the statements are germane to the general allegations in the Amended Consolidated Indictment and the allegations "are not new evidence but separate and constituent different episodic events or, as it were, building-blocks constituting an integral part of, and connected with, the same *res gestae* forming the factual substratum of the charges in the Indictment".

4. The Prosecution says that there are no exceptional circumstances, nor any error in law in the Trial Chamber's ruling of 3 February 2005, and the Applicants would not suffer irreparable prejudice if the Application for Leave to Appeal is denied.

II - ARGUMENTS

A. The test for granting leave to appeal

5. Rule 73(B) of the Rules of Procedure and Evidence of the Special Court reads as follows:

> Decisions rendered on such motions are without interlocutory appeal. However, in exceptional circumstances and to avoid irreparable prejudice to a party, the Trial Chamber may give leave to appeal. Such leave should be sought within 3 days of the decision and shall not operate as a stay of proceedings unless the Trial Chamber so orders.

6. In *The Prosecutor* v. *Issa Hassan Sesay, Morris Kallon, Augustine Gbao*, the Trial Chamber considered Rule 73(B) and held that:

> As a general rule, interlocutory decisions are not appealable and consistent with a clear and unambiguous legislative intent, this rule involves a high threshold that must be met before this Chamber can exercise its discretion to

> grant leave to appeal. The two limbs of the test are clearly conjunctive and not disjunctive; in other words they must both be satisfied.[1]

7. In a more recent decision, the Trial Chamber observed that:

> At this point in time, as the trials are progressing, the Chamber must be very sensitive, and rightly so, to any proceedings or processes that will indeed encumber and unduly protract the ongoing trials. For this reason, it is a judicial imperative for us to ensure that the proceedings before the court are conducted expeditiously and to continue to apply the enunciated criteria with the same degree of stringency as in previous applications for leave to appeal so as not to defeat or frustrate the rationale that underlies the amendment of Rule 73(B).[2]

8. It is clear and obvious that the Applicants will not suffer irreparable prejudice if this Application is denied. At issue is whether or not the Court should hear portions of the evidence of one witness. It may be the case that the witness will deny the evidence in question, his credibility may be impugned, or other evidence will be led to call into question the witness' reliability. Evidentiary rulings are not subject to interlocutory appeal. They are issues raised on appeal if the accused is convicted, if the particular evidence was relied on by the Court, and if an arguable error was made by the Court in relying on that evidence. The only possible way in which the accused could suffer irreparable prejudice is if they now waive their rights to appeal, something the Prosecution doubts can be permitted or enforced by any court.

9. Although the Applicants make expansive statements regarding the imagined effect of the 3 February 2005 Ruling, those statements do not fairly describe the decision. The 3 February 2005 Ruling does nothing more than allow the Prosecution to attempt to call evidence of one witness that is germane to Counts in the Amended Consolidated Indictment.

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[1] *The Prosecutor v. Sesay et al.*, Case No. SCSL-2004-15-PT, "Decision on Prosecution's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution Motions for Joinder", 13 February 2004, para 10.

[2] *The Prosecutor v. Norman et al.*, Case No. SCSL-2004-14-T, "Majority Decision on the Prosecution's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution's Request for Leave to Amend the Indictment Against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa", 2 August 2004, para 25.

10. The Prosecution also wishes to emphasize that there are no exceptional circumstances. Issues involving the admissibility of evidence are a frequent and recurring occurrence in trials. If leave to appeal is granted in this case the threshold for granting leave will be lowered to such an extent that most evidentiary rulings will be subject to appeal following an application for leave to appeal. As this Trial Chamber has already held, the test is a stringent one. It was drafted to be stringent, and logic and common sense dictate that it must be applied stringently. The Appeals Chamber upheld this approach when it stated:

> 29. The underlying rationale for permitting such appeals is that certain matters cannot be cured or resolved by final appeal against judgment. However, most interlocutory decisions of a Trial Chamber will be capable of effective remedy in a final appeal where the parties would not be forbidden to challenge the correctness of interlocutory decisions which were not otherwise susceptible to interlocutory appeal in accordance with the Rules.[3]

11. By the April trial session the Applicants will have had over five months to review the October statements and almost three months to review the January statement.

B. The Defence failed to show that there was a breach of Rule 66 of the Rules of Procedure and Evidence of the Special Court

12. In *The Prosecutor* v. *Issa Hassan Sesay, Morris Kallon, Augustine Gbao*, the Trial Chamber's "Ruling on Oral Application for the Exclusion of "Additional" Statements for Witness TF1-060" reiterated:

> ...what it emphasised in a previous Ruling that Rule 66 does impose upon the Prosecution the obligation to continuously disclose to the Defence copies of statements of all witnesses whom they intend to call which include new developments in the investigation whether in the form of "will-say

[3] *Prosecutor v. Norman, Fofana, Kondewa*, Case No. SCSL-2004-14-T, (Appeals Chamber) "Decision On Prosecution Appeal Against The Trial Chamber's Decision Of 2 August 2004 Refusing Leave To File An Interlocutory Appeal", 17 January 2005.

> statements" or interview notes or any other forms obtained from a witness at any time prior to the witness giving evidence in trial.[4]

13. By disclosing TF1-141's statements dated 9, 19 and 20 October 2004 and 10 January 2005, the Prosecution was simply complying with its ongoing obligation to disclose. Rule 66 A(i) requires disclosure of "the statements of all witnesses whom the Prosecutor intends to call to testify and all evidence to be presented pursuant to Rule 92 *bis* at trial.". According to Rule 66 A(ii), there is an obligation imposed on the Prosecution to "continuously disclose to the Defence copies of the statements of all additional prosecution witnesses whom the Prosecutor intends to call to testify...."

14. In its Ruling, the Trial Chamber referred to the *Prosecutor* v. *Sam Hinga Norman, Moinina Fofana, Allieu Kondewa,*[5] which held:

> It is evident that the premise underlying the disclosure obligations is that the parties should act *bona fides* at all times. There is authority from the evolving jurisprudence of the International Criminal Tribunals that any allegation by the Defence as to a violation of the disclosure rules by the Prosecution should be substantiated with *prima facie* proof of such a violation.

15. Furthermore, this Trial Chamber held at para. 19 of the Ruling in question:

> ...that in determining whether to exclude additional or supplemental statements of prosecution witnesses within the framework of prosecutorial disclosure obligations, a comparative evaluation should be undertaken designed to ascertain (i) whether the alleged additional statement is new in relation to the original statement, (ii) whether there is any notice to the Defence of the event the witness will testify to in the Indictment or Pre-trial Brief of the Prosecution, and (iii) the extent to which the evidentiary material alters the incriminating quality of the evidence of which the Defence already had notice.

16. According to the two-pronged test discussed in *Prosecutor* v. *Bagosora*[6] regarding additional details in a will-say statement, it must first be determined whether the

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[4] *The Prosecutor v. Sesay et al.*, Case No. SCSL-2004-15-T, "Ruling on Oral Application for the Exclusion of "Additional Statements" for Witness TF1-060", 23 July 2004, para 15.
[5] *The Prosecutor v. Norman et al.*, Case No. SCSL-2004-14-PT, "Decision on Disclosure of Witness Statements and Cross-Examination", 16 July 2004, para 7.
[6] ICTR-98-41-T, "Decision on the Admissibility of Evidence of Witness DP" 18 November 2003.

evidence disclosed is actually new and if it is then what period of notice would be required to allow the Defence to adequately prepare.

17. In the present instance, the Court made a finding of fact that the additional statements contain no new allegations and that they were supplemental in nature. Such a finding of fact is not normally subject to appeal. Moreover, there is no compelling fairness issue because the Applicants will have had many months to review the statements before the witness is called.

18. The Applicants' position amounts to this (this view was stated by counsel for Sesay during argument): Rule 66 requires continuous disclosure by the Prosecution but does not allow the Prosecution to rely on those statements. That position is wrong.

19. It is consistent with the purpose of Rule 66 and in keeping with the principle of orality, that the statements should not be excluded. In the case of *Prosecutor* v. *Sam Hinga Norman, Moinina Fofana, Allieu Kondewa*[7], the Trial Chamber ruled on 16 July 2004, that although the witness statements disclosed by the Prosecution did not make reference to the events described during the testimony, the facts were admissible since:

> ...it is foreseeable that witnesses, by the very nature of oral testimony, will expand on matters mentioned in their witness statements... The Trial Chamber notes that where a witness has testified to matters not expressly contained in his or her witness statement, the cross-examining party may wish to highlight this discrepancy and further examine on this point.

20. In the same decision, the Trial Chamber stated at paragraph 27:

> The Prosecution, in keeping with its continuing obligation to disclose additional materials, have continued to disclose such materials prior to and during trial, in some instances up to a day before the witness is due to testify. The Trial Chamber does not have any evidence before it, at this time, that the continued disclosure of witness statements by the Prosecution has violated the disclosure rules. In circumstances where the Prosecution obtains additional

[7] *The Prosecutor v. Norman et al.*, Case No. SCSL-2004-14-PT, "Decision on Disclosure of Witness Statements and Cross-Examination", 16 July 2004, para 25.

> evidence from a witness that is subject to disclosure, then the Prosecution is required, pursuant to this Rule, to continuously disclose this material.[8]

21. The Defence have not shown, with *prima facie* proof, that there has been any violation of the rules of disclosure by the Prosecution.

Reference to Defendant Issa Hassan Sesay

22. The statements of 9, 19 and 20 October 2004 and 10 January 2005 refer to allegations that are contained in the "Amended Consolidated Indictment". More specifically, the disputed statements are relevant to Counts 1-2 – Terrorizing the civilian population and collective punishments, Counts 3-5 – Unlawful killings, Counts 6-9 – Sexual violence, Count 12 – Use of child soldiers, Count 14 – Looting and burning.

23. The Pre-Trial Brief, at pages 8 to 22, as well as the Supplemental Pre-Trial Brief, at pages 6 to 94, filed by the Prosecution also make specific reference to the allegations in the disputed statements. Thus, the Defence errs in submitting that these additional statements put forth allegations that are entirely new.

Reference to Defendant Augustine Gbao

24. The Applicant Gbao submits that he was surprised to be placed as a "direct participant in the mistreatment of the civilians in Kailahun according to the witness."

25. In the "Amended Consolidated Indictment" specific reference is made at para. 31 to Gbao being in control of Kailahun. Furthermore, the "Amended Consolidated Indictment" charges Gbao with several crimes which clearly constitute mistreatment of civilians. As noted in the Court's decision (at para. 22), the statements in issue are germane to the factual allegations in both the Pre-Trial Brief and the Supplemental Pre-Trial Brief filed by the Prosecution.

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[8] *Id.*

26. The submission that Defendant Gbao is somehow prejudiced by disclosure suggesting that Defendant Gbao is a G-5 officer misconceives the law. A witness statement contains proposed evidence, not allegations the Prosecution must prove. Assuming the Court finds that Defendant Gbao is a G-5 officer, such a finding is not dispositive of any allegation made against Gbao.

27. Finally, the fact that Defendant Gbao has chosen not to instruct counsel does not compel the Prosecution to act differently towards Defendant Gbao.[9]

C. The Defence failed to show that there was a breach of Article 17 of the Statute

28. The Defence has not demonstrated that the additional witness statements dated 9, 19 and 20 October 2004 and 10 January 2005, would cause irreparable prejudice to the Defendants' rights and more specifically to (a) the right to be informed promptly and in detail of the nature and cause of the charge against him; (b) the right to be presumed innocent until proved guilty; (c) the right to have adequate time and facilities for the preparation of the defence and (d) the right to be tried without delay.

29. The Applicants have been informed of the nature and cause of the charges against them since the "Amended Consolidated Indictments" was served. In no way do the statements in question imperil the Defendants' right to be presumed innocent. The Applicants will have had considerable time to prepare for the evidence in the statements, and hearing the evidence referred to in these statements will cause no delay to the trial.

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[9] We wish to add that Gbao's statement at para. 8 of the Application For Leave to Appeal does not completely set out the representation made by the Prosecution in Court. The Prosecution said that because of its concern for further delays and inconvenience to a young witness, which were unique and particular circumstances, that should the Court take the view that it would be unfair for the Prosecution to lead the evidence in the 10 January 2005 statement then the Court could direct the Prosecution not to lead that evidence. This suggestion was made in the event the Court was considering adjourning the evidence of TF1-141, and was intended as compromise to avoid an adjournment while allowing most of the witness' evidence to be heard. The suggestion was made only in respect of the accused Sesay. The evidence in the 10 January 2005 statement regarding Gbao is clearly an amplification of evidence disclosed about Gbao in the 9 October 2004 statement and the Prosecution's view is that the January 2005 statement was always admissible against Gbao.

30. The Applicant Sesay asserts, wrongly, that the Prosecution's ongoing disclosure is greater at the Special Court for Sierra Leone than at any other court (see para. 36 of the Sesay Application). It is certainly the case that in Canada and Australia,[10] the Crown is entitled to, and is obligated to, disclose evidence relevant to the allegations at any time. Adjournments are often granted in such cases.

31. The Applicants' rights are protected just as the rights of any accused are protected in a criminal trial, by their right to cross-examine Witness TF1-141 and call witnesses in support of the defence. The right to cross-examination gives accused persons to opportunity to question the credibility of the witness and challenge the evidence tendered by the witness. There has been no breach of Article 17.

III – CONCLUSION

32. The Applicants have not demonstrated that there are exceptional circumstances and that they would suffer irreparable prejudice if leave to appeal is denied, as required by Rule 73(B). The Applicants showed no error either in law or in fact. The Trial Chamber applied the correct principles and arrived at the correct decisions.

33. Accordingly, the Applications should be dismissed.

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[10] For example, in Australia see the *CRIMINAL PROCEDURE ACT 1986*, of New South Wales, s. 141. (Attachment 1)

141 Disclosure requirements are ongoing

(1) The obligation to undertake pre-trial disclosure continues until any of the following happens:
(a) the accused person is convicted or acquitted of the charges in the indictment,
(b) the prosecution is terminated.
(2) Accordingly, if any information, document or other thing is obtained or anything else occurs after pre-trial disclosure is made by a party to the proceedings, that would have affected that pre-trial disclosure had the information, document or thing been obtained or the thing occurred before pre- trial disclosure was made, the information, document, thing or occurrence is to be disclosed to the other party to the proceedings as soon as practicable.

Freetown, 16 February 2005

For the Prosecution,

Luc Côté

for Lesley Taylor

Attachment 1

Reprint No 6 28 July 2003

New South Wales

An Act relating to the prosecution of indictable offences, the listing of criminal proceedings before the Supreme Court and the District Court, committal proceedings and proceedings for summary offences and the giving of certain indemnities and undertakings; and for other purposes.

Chapter 1 Preliminary

1 Name of Act

This Act may be cited as the *Criminal Procedure Act 1986*.

2 Commencement

(1) Sections 1 and 2 shall commence on the date of assent to this Act.

(2) Except as provided by subsection (1), this Act shall commence on such day as may be appointed by the Governor and notified by proclamation published in the Gazette.

3 Definitions

(1) In this Act, except in so far as the context or subject-matter otherwise indicates or requires:

accused person includes, in relation to summary offences, a defendant and, in relation to all offences (where the subject-matter or context allows or requires), a barrister or solicitor representing an accused person.

apprehended violence order has the same meaning as it has in Part 15A of the *Crimes Act 1900*, and includes an interim apprehended violence order made under that Part.

authorised officer means:

(a) a registrar of a court, or

(b) an employee of the Attorney General's Department authorised by the Attorney General as an authorised officer for the purposes of this Act.

bail has the same meaning as it has in the *Bail Act 1978*.

Chief Magistrate means the Chief Magistrate of the Local Courts appointed under the *Local Courts Act 1982*.

committal proceedings means a hearing before a Magistrate for the purpose of deciding whether a person charged with an indictable offence should be committed for trial or sentence.

court means:

(a) the Supreme Court, the Court of Criminal Appeal, the Land and Environment Court, the Industrial Relations Commission, the District Court or a Local Court, or

(b) any other court that, or person who, exercises criminal jurisdiction,

but, subject to the *Children (Criminal Proceedings) Act 1987*, does not include the Children's Court or any other court that, or person who, exercises the functions of the Children's Court.

Court of Coal Mines Regulation means the Court of Coal Mines Regulation established under the *Coal Mines Regulation Act 1982*.

exercise a function includes perform a duty.

function includes a power, authority or duty.

indictable offence means an offence (including a common law offence) that may be prosecuted on indictment.

Industrial Magistrate means an Industrial Magistrate appointed under the *Industrial Relations Act 1996*.

Industrial Relations Commission in Court Session means the Industrial Relations Commission constituted as referred to in section 151 of the *Industrial Relations Act 1996*.

intervention plan—see section 346.

intervention program—see section 346.

Licensing Court means a Licensing Court established under the *Liquor Act 1982*.

Licensing Magistrate means a licensing magistrate appointed under the *Liquor Act 1982*.

Local Court means a Local Court established under the *Local Courts Act 1982*.

Magistrate means a Magistrate appointed under the *Local Courts Act 1982*.

offence means an offence against the laws of the State.

prescribed sexual offence means:

(a) an offence under section 61I, 61J, 61JA, 61K, 61L, 61M, 61N, 61O, 65A, 66A, 66B, 66C, 66D, 66EA, 66F or 80A of the *Crimes Act 1900*, or

(b) an offence that includes the commission, or an intention to commit, an offence referred to in paragraph (a), or

(c) an offence that, at the time it was committed, was a prescribed sexual offence for the purposes of this Act or the *Crimes Act 1900*, or

the accused person accepts the transcript as accurate and, if not, in what respect the transcript is disputed,

(e) notice as to whether the accused person proposes to dispute the accuracy or admissibility of any proposed documentary evidence or other exhibit disclosed by the prosecutor,

(f) notice as to whether the accused person proposes to dispute the admissibility of any other proposed evidence disclosed by the prosecutor and the basis for the objection,

(g) notice of any significant issue the accused person proposes to raise regarding the form of the indictment, severability of the charges or separate trials for the charges.

140 Prosecution response to defence response

The notice of the prosecution response to the defence response is to contain the following:

(a) if the accused person has disclosed an intention to adduce expert evidence at the trial, notice as to whether the prosecutor disputes any of the expert evidence and, if so, in what respect,

(b) if the accused person has disclosed an intention to tender any exhibit at the trial, notice as to whether the prosecutor proposes to raise any issue with respect to the continuity of custody of the exhibit,

(c) if the accused person has disclosed an intention to tender any documentary evidence or other exhibit at the trial, notice as to whether the prosecutor proposes to dispute the accuracy or admissibility of the documentary evidence or other exhibit,

(d) notice as to whether the prosecutor proposes to dispute the admissibility of any other proposed evidence disclosed by the accused person, and the basis for the objection,

(e) a copy of any information, document or other thing in the possession of the prosecutor, not already disclosed to the accused person, that might reasonably be expected to assist the case for the defence,

(f) a copy of any information, document or other thing that has not already been disclosed to the accused person and that is required to be contained in the notice of the case for the prosecution.

141 Disclosure requirements are ongoing

(1) The obligation to undertake pre-trial disclosure continues until any of the following happens:

(a) the accused person is convicted or acquitted of the charges in the indictment,

(b) the prosecution is terminated.

(2) Accordingly, if any information, document or other thing is obtained or anything else occurs after pre-trial disclosure is made by a party to the proceedings, that would have affected that pre-trial disclosure had the information, document or thing been obtained or the thing occurred before pre-trial disclosure was made, the information, document, thing or occurrence is to be disclosed to the other party to the proceedings as soon as practicable.

142 Court may waive requirements

(1) A court may, by order, waive any of the pre-trial disclosure requirements that apply under this Division.

(2) The court may make such an order on its own initiative or on the application of the prosecutor or

the accused person.

(3) An order may be made subject to such conditions (if any) as the court thinks fit.

143 Requirements as to notices

(1) A notice under this Division is to be in writing.

(2) Any notice purporting to be given under this Division on behalf of the accused person by his or her legal practitioner is, unless the contrary is proved, taken to have been given with the authority of the accused person.

(3) A notice under this Division that is required to be given to a prosecutor may be given to the prosecutor in the following manner, or as otherwise directed by the court:

(a) by delivering it to the prosecutor,

(b) by leaving it at the office of the prosecutor,

(c) by sending it by post or facsimile to the prosecutor at the office of the prosecutor,

(d) by sending it by electronic mail to the prosecutor, but only if the prosecutor has agreed to notice being given in that manner.

(4) A notice under this Division that is required to be given to an accused person may be given to the accused person in the following manner, or as otherwise directed by the court:

(a) by delivering it to the accused person,

(b) by leaving it at the office of the legal practitioner of the accused person,

(c) by sending it by post or facsimile to the legal practitioner of the accused person at the office of the legal practitioner,

(d) by sending it by electronic mail to the legal practitioner, but only if the legal practitioner has agreed to notice being given in that manner.

144 Copies of exhibits and other things not to be provided if impracticable

(1) A copy of a proposed exhibit, document or thing is not required to be included in a notice under this Division if it is impossible or impractical to provide a copy.

(2) However, the party required to give the notice:

(a) is to specify in the notice a reasonable time and place at which the proposed exhibit, document or thing may be inspected, and

(b) is to allow the other party to the proceedings a reasonable opportunity to inspect the proposed exhibit, document or thing referred to in the notice.

145 Personal details not to be provided

(1) The prosecutor is not to disclose in any notice under this Division the address or telephone number of any witness proposed to be called by the prosecutor, or of any other living person, unless:

(a) the address or telephone number is a materially relevant part of the evidence, or

(b) the court makes an order permitting the disclosure.