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COURT OF APPEAL FOR ONTARIO

**RE: THE COLLEGE OF PHYSICIANS AND SURGEONS OF
ONTARIO (Applicant/Respondent/Responding Party) – and –
DR. ALBERT ROSS DEEP (Respondent/Appellant/Moving
Party)**

BEFORE: BORINS, LANG and JURIANSZ JJ.A.

**COUNSEL: Dr. Albert R. Deep in person
for the moving party**

**Louis Sokolov
for the responding party**

HEARD: September 9, 2004

**Motion to review the order of Justice Michael J. Moldaver of the Court of Appeal
for Ontario dated April 21, 2004.**

ENDORSEMENT
Released Orally: September 9, 2004

[1] We are asked to review the order of Justice Moldaver of April 21, 2004. In our view, it was in his discretion to hear the motion on short notice and to grant the extension of time to serve the notice of motion. We are satisfied that he exercised his discretion appropriately and that the hearing was fair.

[2] In our view, Moldaver J.A. was also correct in ordering that the appellant's factum and compendium be removed from the court file on the grounds that it contained material that was not before Justice Carnwath, from whose order the appeal is taken.

[3] This was the material to which Moldaver J.A. referred in his endorsement as "fresh evidence". He further ordered that the appellant file a new factum and compendium containing only the record before Carnwath J., but made it clear that Dr. Deep could apply to the panel hearing the appeal to introduce material that was not before Carnwath J. as fresh evidence, under s. 134 of the *Courts of Justice Act*. Dr. Deep

indicated to us that he intends to make an application to introduce the materials as fresh evidence before the panel.

[4] The appeal from Carnwath J.'s order is scheduled to be heard on Friday, September 17, 2004. Counsel for the College of Physicians and Surgeons of Ontario does not object to the appellant's appeal book, compendium and factum remaining in the court file on the understanding that Dr. Deep will not rely on any material that was not before Carnwath J. unless he receives leave from the panel to do so. Counsel takes this position in order to expedite the hearing of the appeal. We are in accord with the position taken by the College.

[5] Accordingly, we would vary the order of Moldaver J.A. by deleting paragraphs 2 and 4.

[6] As for the costs of the motion before Moldaver J.A., we would not interfere with the exercise of his discretion in awarding costs. We have no jurisdiction to consider the other costs orders referred to in paragraph 3 of the appellant's notice of motion.

[7] In addition, we would adjourn the motion for the application to introduce fresh evidence contained in paragraph 2 of the notice of motion to the panel hearing the appeal.

[8] Subject to the above variation of the order of Moldaver J.A., the motion to review that order is dismissed. In our view, as today's motion was unnecessary we would award costs to the College of Physician and Surgeons of Ontario in the amount of \$4,500 inclusive of disbursements and GST.

"S. Borins J.A."

"Susan E. Lang J.A."

"R. G. Juriansz J.A."