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**IN THE MATTER OF THE *SECURITIES ACT*,**
**R.S.O. 1990, c. S.5, AS AMENDED**

**- AND -**

**IN THE MATTER OF AN APPLICATION BY THE SPECIAL COMMITTEE OF DIRECTORS OF THE VENGROWTH FUNDS**

**- AND -**

**IN THE MATTER OF GROWTHWORKS CANADIAN FUND LTD. AND GROWTHWORKS LTD.**

# REASONS FOR DECISION

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| **Hearing:** | June 1 and 2, 2011 | |
| **Order:** | June 9, 2011 | |
| **Reasons for Decision:** | June 14, 2011 | |
| **Panel:** | James E. A. Turner | - Vice-Chair and Chair of the Panel |
| | Mary G. Condon | - Vice-Chair |
| **Appearances:** | Philip Anisman (Barrister and Solicitor)<br><br>Emily Cole<br>Jay Hoffman<br>(Miller Thomson LLP) | - Counsel for The Special Committee of Directors of The VenGrowth Funds, Applicant |
| | R. Paul Steep<br>Jonathan R. Grant<br>Andrew B. Matheson<br>(McCarthy Tetrault LLP)<br><br>James Doris<br>James Bunting<br>J. Alexander Moore<br>(Davies Ward Phillips & Vineberg LLP) | - Counsel for GrowthWorks Canadian Fund Ltd. and Growth Works Ltd., Respondents |

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| Robert W. Staley<br>Johnathan G. Bell<br>Derek J. Bell<br>(Bennett Jones LLP) | - Counsel for the VenGrowth Managers, Intervenors |
| James Sasha Angus<br>Naizam Kanji<br>Shannon O'Hearn<br>Vera Nunes | - For Staff of the Ontario Securities Commission |

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## REASONS FOR DECISION

## 1. INTRODUCTION

[1] GrowthWorks Canadian Fund Ltd. ("**GrowthWorks**") has commenced a hostile merger proposal (the "**GrowthWorks Proposal**") to acquire The VenGrowth Investment Fund Inc., The VenGrowth II Investment Fund Inc., The VenGrowth III Investment Fund Inc., The VenGrowth Advanced Life Sciences Fund Inc. and The VenGrowth Traditional Industries Fund Inc. (collectively, the "**VenGrowth Funds**") by making a proposal directly to the shareholders of the VenGrowth Funds (the "**VenGrowth shareholders**"). It has initiated the GrowthWorks Proposal by soliciting VenGrowth shareholders to enter into support agreements (the "**Support Agreements**") with it. Those Support Agreements purport, among other matters, to give GrowthWorks an irrevocable power of attorney (i) to requisition meetings of the VenGrowth shareholders, (ii) to vote the VenGrowth shares that are subject to the Support Agreements (the "**Subject Shares**") in favour of the GrowthWorks Proposal, (iii) to vote the Subject Shares to elect certain directors of the VenGrowth Funds and to make certain amendments to the articles of the VenGrowth Funds, and (iv) to vote against any transaction competing with the GrowthWorks Proposal.

[2] In connection with the solicitation of the Support Agreements, GrowthWorks has sent an information circular dated March 14, 2011 (the "**GrowthWorks Circular**") to VenGrowth shareholders together with the form of the Support Agreement being solicited. The GrowthWorks Circular provides very substantial information with respect to the GrowthWorks Proposal and the solicitation of the Support Agreements.

[3] In response to its solicitation, as of the date of the hearing, GrowthWorks indicates that it has received over 10,500 signed Support Agreements from VenGrowth shareholders representing over eight million shares of the VenGrowth Funds and approximately 7.5% to 10.8% of the outstanding shares of each of the VenGrowth Funds.

[4] The special committee of independent directors of the VenGrowth Funds (the "**Special Committee**") has brought this application pursuant to subsection 127(1) of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "**Act**") to challenge GrowthWorks' solicitation of the Support Agreements and its right to vote the Subject Shares.

[5] The Special Committee submits that GrowthWorks' novel mechanism for acquiring control of the VenGrowth Funds deprives the VenGrowth shareholders of rights that they would have in a take-over bid or proxy contest to decide whether to accept the GrowthWorks Proposal or any competing transaction. The Special Committee submits that GrowthWorks' actions contravene the proxy solicitation requirements of the Act and of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, as amended (the "**CBCA**") and are inconsistent with the animating principles underlying the Act's requirements for take-over bids and proxy contests. The Special Committee also submits that the GrowthWorks Circular and other documents distributed by GrowthWorks contain incomplete and materially misleading disclosure. The Special Committee submits that GrowthWorks' solicitation of the Support Agreements is thus both illegal and contrary to the public interest.

[6] The Special Committee asks us to issue a cease trade order under subsection 127(1) of the Act prohibiting GrowthWorks and its related entities from continuing to solicit VenGrowth shareholders and from taking further steps in pursuit of the GrowthWorks Proposal unless it complies with Ontario securities law and applicable corporate law. The Special Committee requests us to issue a cease trade order in respect of the GrowthWorks Proposal that would, amongst other things, prevent GrowthWorks from voting any of the Subject Shares at any meeting of VenGrowth shareholders.

[7] We note that no VenGrowth shareholders appeared at the hearing of this matter or made any complaint with respect to the solicitation by GrowthWorks of the Support Agreements. GrowthWorks has indicated that, as of the date of the hearing, it has received 26 revocation requests in respect of Support Agreements, representing 40 shareholding positions.

[8] We issued our Order in this matter on June 9, 2011, and our reasons on June 14, 2011, on an expedited basis in view of the ongoing actions of GrowthWorks to advance the GrowthWorks Proposal and the Special Committee's ongoing conduct of the auction process referred to below.

## 2. BACKGROUND

### *a. The VenGrowth Funds*

[9] The VenGrowth Funds are labour-sponsored venture capital corporations ("**LSVCCs**") under the *Income Tax Act* (Canada) that have over 130,000 individual shareholders across Canada and approximately $400 million in assets under management. The VenGrowth Investment Fund Inc. and The VenGrowth II Investment Fund Inc. are corporations continued under the *Business Corporations Act* (British Columbia). The other three VenGrowth Funds are corporations incorporated under the CBCA.

[10] Each of the VenGrowth Funds is a mutual fund and reporting issuer under Ontario securities law. The securities of the VenGrowth Funds are not listed on any stock exchange.

[11] The shares of the VenGrowth Funds are not directly transferable and the VenGrowth Managers have effective control over the election of the board of directors of the VenGrowth Funds. As a result, the VenGrowth shareholders have limited ability to initiate a sale of the VenGrowth Funds or sell their interests in those funds.

[12] In January, 2011, following the public announcement of the GrowthWorks Proposal, the VenGrowth board of directors formed the Special Committee to lead a strategic review process to arrive at a transaction that would improve VenGrowth shareholder value and liquidity. We refer to that process as the "auction process".

[13] The Special Committee announced at the hearing of this matter that it entered into a letter of intent with Covington Capital Corporation ("**Covington**") on May 31, 2011 which provides, amongst other things, that each of the Special Committee and Covington will use its best efforts to agree, by June 9, 2011, on the form of a final definitive merger agreement, and that the VenGrowth Funds and Covington will sign a definitive merger agreement if,

and at such time that, (i) the Commission or the Courts order that the Subject Shares cannot be voted at a VenGrowth shareholders' meeting in favour of the GrowthWorks Proposal or against the Covington transaction; or (ii) GrowthWorks agrees that it will not vote the Subject Shares in that manner.

***b. GrowthWorks***

[14] GrowthWorks is one of Canada's oldest and largest retail venture capital funds. It is incorporated under the CBCA and registered as a LSVCC under the *Income Tax Act* (Canada).

[15] GrowthWorks has over 100,000 shareholders across Canada and approximately $240 million in assets under management. It is a mutual fund and reporting issuer under Ontario securities law. GrowthWorks' securities are not listed on any stock exchange.

[16] GrowthWorks publicly announced the GrowthWorks Proposal on December 9, 2010. The auction process being conducted by the Special Committee appears to be, at least in part, a response to that announcement.

[17] GrowthWorks has made the GrowthWorks Proposal directly to the VenGrowth shareholders by mailing the GrowthWorks Circular and soliciting the Support Agreements. If approved, the GrowthWorks Proposal would result in a merger of the VenGrowth Funds into GrowthWorks. That transaction is described in the GrowthWorks Circular as follows:

> The Merger will be completed through an asset purchase transaction whereby GrowthWorks Canadian Fund buys the net assets of each of the VenGrowth Funds in exchange for one or more newly created series of Class A shares of GrowthWorks Canadian Fund … that would then be distributed to Class A shareholders of the VenGrowth Funds. This is the structure commonly used by mutual funds in Canada to complete mergers. The Merger is expected to be completed pursuant to terms and conditions set out in a merger agreement … and/or court-approved plan of arrangement … .

The GrowthWorks Circular describes the terms and conditions expected to be set out in the merger agreement or plan of arrangement and summarizes a number of the expected conditions to the merger.

[18] The Support Agreements are generally irrevocable by VenGrowth shareholders. The Support Agreements provide for their suspension to enable VenGrowth shareholders to accept a "superior proposal". However, the determination of whether a transaction is a "superior proposal" is made by three individuals (who were designated by GrowthWorks and who GrowthWorks submits are independent of GrowthWorks and VenGrowth) and not by the VenGrowth shareholders who are parties to the Support Agreements.

[19] At the hearing, GrowthWorks confirmed its intention to send a letter to each VenGrowth shareholder who has entered into a Support Agreement, offering to amend the Support Agreement to allow the shareholder to terminate the Support Agreement and revoke

the powers granted to GrowthWorks, or limit the authority granted to GrowthWorks to only requisitioning shareholder meetings.

## 3. LEAVE TO BRING THE APPLICATION

[20] The Special Committee has applied for relief under subsection 127(1) of the Act. The Commission has held that a person, other than Staff, is not entitled as of right to bring an application under that subsection. The Commission will not permit such an application where it is "at its core" an enforcement proceeding intended to impose sanctions for past breaches of the Act or for conduct alleged to be contrary to the public interest. The Commission has, however, exercised its discretion to permit an application that, although based on past conduct and/or breaches of the Act, seeks relief that is forward-looking and intended to prevent the completion or continuation of conduct that is contrary to the Act or the public interest. The Commission will permit such an application only where the Commission has authority to impose an appropriate remedy if it concludes that it is in the public interest to do so.

[21] In our view, the Special Committee has met the criteria set out in *Re MI Developments Inc.*, (2010) 33 OSCB 126 at paras. 107-110 to bring this application. The application is not "at its core" an enforcement matter focused only on past conduct but relates to competing proposals to acquire the VenGrowth Funds and the continuing actions by GrowthWorks to advance the GrowthWorks Proposal. The application raises a serious question whether GrowthWorks has breached, and is continuing to breach, the proxy solicitation rules under Ontario securities law intended for the protection of shareholders and whether GrowthWorks has acted contrary to the public interest.

[22] Accordingly, we granted the Special Committee's application to bring this matter under subsection 127(1) of the Act.

## 4. LIMITED STANDING GRANTED TO THE VENGROWTH MANAGERS

[23] The Special Committee, GrowthWorks and Staff consented to limited standing being granted to the management companies that manage the VenGrowth Funds (the "**VenGrowth Managers**") for the purpose of making submissions and to advance limited evidence relating to (i) the management and administration agreements between the VenGrowth Funds and the VenGrowth Managers that GrowthWorks allegedly intends to abrogate if the GrowthWorks Proposal is successful, and (ii) the allegedly material deficiencies in disclosure and material misrepresentations in the GrowthWorks Circular.

[24] We granted limited standing on the terms referred to in paragraph 23 of these reasons to the VenGrowth Managers, subject to them complying with the agreed schedule for the conduct of this hearing. We note for the record that we should not be taken to have concluded that management or senior officers of an issuer are automatically entitled to such standing. In our view, the VenGrowth Managers are only indirectly affected by this application. We note, however, that the Special Committee appears to be acting independently of the VenGrowth Managers and we are advised that the Special Committee did not discuss the application with the VenGrowth Managers before it was filed with the Commission. Accordingly, the

VenGrowth Managers may provide valuable assistance to us in understanding the business and disclosure issues raised by this matter.

## 5. SUBMISSIONS

### *a. Special Committee*

[25] Further to the submissions made in paragraph 5 of these reasons, the Special Committee submits that the Support Agreements constitute "proxies" within the meaning of Ontario securities law and that such proxies do not comply with applicable securities and corporate law. The Special Committee submits, in particular, that under applicable corporate law, a proxy must authorize a holder to vote only at a specified shareholders' meeting and must be revocable by the shareholder. The Support Agreements do not comply with these requirements. In any event, the Special Committee submits that the solicitation of the Support Agreements undermines the animating principles of the Act with respect to take-over bids and proxy contests and is contrary to the public interest.

### *b. VenGrowth Managers*

[26] The VenGrowth Managers submit that the GrowthWorks Circular and other documents distributed by GrowthWorks contain material deficiencies in disclosure and material misrepresentations.

### *c. GrowthWorks*

[27] GrowthWorks submits that by signing the Support Agreements in its favour, an "overwhelming" number of VenGrowth shareholders have sent "a clear message" that they have lost confidence in the VenGrowth board and are not prepared to entrust the fate of their VenGrowth investments to the exclusive control of that board.

[28] GrowthWorks recognises that its solicitation of the Support Agreements from VenGrowth shareholders in these circumstances is novel and unprecedented. It submits, however, that it is not illegal or abusive. In any event, GrowthWorks submits that any concerns raised by the Special Committee have been fully answered by GrowthWorks' decision to provide shareholders who signed Support Agreements a right to revoke those agreements or limit the authority under those agreements to only requisitioning VenGrowth shareholder meetings.

[29] GrowthWorks acknowledges that the Special Committee is in the process of soliciting transactions to maximize value for VenGrowth shareholders and that the Special Committee has invited GrowthWorks to participate in that process. GrowthWorks submits, however, that VenGrowth requested GrowthWorks to enter into a process agreement that would have prohibited GrowthWorks, without the Special Committee's consent, from soliciting the shareholders of the VenGrowth Funds, making proposals directly to them or attempting to influence how they vote. GrowthWorks says that, if it had signed the requested process agreement, it would have had no assurance that the GrowthWorks Proposal would be presented to VenGrowth shareholders even if it was the best transaction. It appears, however, that GrowthWorks did not attempt to negotiate these terms of the process agreement.

[30] Finally, GrowthWorks submits that, at a later stage in this process, when a shareholders' meeting or meetings of the VenGrowth Funds will be called, VenGrowth shareholders will receive an information circular and a form of proxy, both in compliance with applicable law. GrowthWorks submits that circular will provide VenGrowth shareholders sufficient information with respect to the GrowthWorks Proposal to make an informed decision.

### *d. Staff*

[31] Staff submits that GrowthWorks' solicitation of the Support Agreements appears to constitute an illegal proxy solicitation under the Act. Further, Staff alleges that the GrowthWorks Circular does not, at this stage of the process, contain sufficient information to permit the VenGrowth shareholders to make an informed decision with respect to the GrowthWorks Proposal. Staff submits that the Support Agreements should be revocable by VenGrowth shareholders and that GrowthWorks should not be permitted to vote the Subject Shares on any vote related to the GrowthWorks Proposal or any competing transaction. Staff submits that if GrowthWorks wishes to vote VenGrowth shares on the approval of the GrowthWorks Proposal, it should carry out a subsequent proxy solicitation, pursuant to a new circular with improved disclosure, in accordance with applicable law.

## 6. OUR PUBLIC INTEREST JURISDICTION

[32] The Commission's mandate, set out in section 1.1 of the Act, is to provide protection to investors from unfair, improper or fraudulent practices, and to foster fair and efficient capital markets and confidence in capital markets. To achieve these objectives, section 127 of the Act gives the Commission "the jurisdiction and a broad discretion to intervene in Ontario capital markets if it is in the public interest to do so" (*Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132 ("***Asbestos***") at para. 45). In *Asbestos*, the Supreme Court of Canada indicated that the Commission's public interest jurisdiction "is not unlimited" and is subject to two constraints:

> In exercising its discretion, the OSC should consider the protection of investors and the efficiency of, and public confidence in, capital markets generally. In addition, s. 127(1) is a regulatory provision. The sanctions under the section are preventive in nature and prospective in orientation. Therefore, s. 127 cannot be used merely to remedy Securities Act misconduct alleged to have caused harm or damages to private parties or individuals.
>
> (*Asbestos*, *supra*, at para. 45)

[33] The Commission recognises that its public interest jurisdiction must be exercised "with caution and restraint" (see, for example, *Re Sterling Centrecorp Inc*. (2007), 30 OSCB 6683 ("***Sterling Centrecorp***"), at para. 212; *Re Patheon Inc.* (2009), 32 OSCB 6445 ("***Patheon***"), at para. 114; and *Re Hudbay* (2009), 32 OSCB 3733 ("***Hudbay***"), at para. 231).

[34] It is not the role of the Commission to assess the business or financial merits of any proposed transaction or transactions (*Hudbay*, *supra*, at para. 233).

[35] The Commission has authority to intervene in the public interest where an abuse of investors or the capital markets has occurred (see *Re Canfor Corp.* (1995), 18 OSCB 475 at 487; *Re Canadian Tire Corp*. (1987), 10 OSCB 857 ("***Canadian Tire***") at 947-948, aff'd *C.T.C. Dealer Holdings Ltd. v. Ontario (Securities Commission)* (1987), 59 O.R. (2d) 79 (Div. Ct.); *Sterling Centrecorp, supra*, at para. 208; and *Re Financial Models* (2005), 2 B.L.R. (4th) 223 at para. 62 (OSC) ("***Financial Models***").

[36] When considering the exercise of its public interest jurisdiction, the Commission must have regard to "all of the facts, all of the policy consideration[s] at play, all of the underlying circumstances of the case, and all of the interests affected by the matter and the remedy sought" (*Sterling Centrecorp, supra,* at para. 212).

[37] Further, as stated in *Patheon*, the Commission's public interest jurisdiction "allows us to intervene in a take-over bid even if there is no breach of the Act, the regulations or any policy statement". In *Patheon,* the Commission stated:

> There should be no doubt in the minds of market participants that the Commission will intervene in the public interest where the take-over bid rules have been complied with but the animating principles underlying those rules have not. In *Re Mithras Management Ltd.* (1990), 13 O.S.C.B. 1600 at 1617 and 1618, the Commission stated that:
>
> > It should be clear to all that the underlying purpose of Part XIX of the Act is the protection of the integrity of the capital markets in which take-over bids are made, and in particular the protection of investors who are solicited in the course of a takeover bid. Those purposes are carried out through provisions which, among other things, attempt to ensure that equal treatment is accorded to all offerees in a bid, that offerees have a reasonable time within which to consider the terms of a bid, and that adequate information is available to offerees to allow them to make a reasoned decision as to whether to accept or reject a bid. These provisions exist to protect investors, of course, but their over-arching purpose is the protection of the integrity of the capital markets in which those investors have placed their money – and their trust.
>
> (*Patheon, supra*, at para. 116; see also *Re Cablecasting Ltd.,* [1978] OSCB 37, at 43; *Canadian Tire, supra,* at 947-948; *Re H.E.R.O. Industries Ltd.* (1990), 13 OSCB 3775, at 3794; *Sterling Centrecorp, supra*, at para. 212; *Financial Models, supra,* at para. 50; *Re Sears Canada Inc.* (2006), 22 B.L.R. (4th) 267, at para. 242; and *Re Magna International Inc.* (2011), 34 OSCB 1290, at paras. 180-195)

[38] A proxy solicitation in connection with a merger or acquisition transaction raises the same investor protection issues as a take-over bid.

## 7. DISCUSSION AND ANALYSIS

### *a. Introduction*

[39] There is no question that the circumstances of this matter are unique as a result of the nature of the VenGrowth Funds as LSVCCs and because the VenGrowth shareholders have limited rights as such (see paragraph 11 of these reasons).

[40] By soliciting Support Agreements from the approximately 130,000 holders of VenGrowth shares, GrowthWorks has bypassed the auction process being conducted by the Special Committee in soliciting competing transactions that are intended to maximize value for VenGrowth shareholders. That process has resulted in a letter of intent under which Covington has agreed with the Special Committee to make a merger proposal to acquire the VenGrowth Funds. The letter of intent states that Covington will enter into a formal merger agreement only if the Commission or a Court issues a decision preventing GrowthWorks from voting the Subject Shares on the GrowthWorks Proposal or against any competing transaction.

[41] None of the parties disputed that, if GrowthWorks can vote the Subject Shares, GrowthWorks would likely carry any vote at a VenGrowth shareholders' meeting with respect to any merger proposal or other transaction. In particular, those votes appear to be sufficient to approve the GrowthWorks Proposal and to defeat any competing transaction.

[42] Accordingly, the issues we are required to address in this matter arise in the midst of a battle for the support of VenGrowth shareholders for competing proposals. GrowthWorks submits that these issues must be considered in the context of an earlier failed merger transaction agreed to by the VenGrowth Funds and Covington that was ultimately defeated in late 2010 by shareholder opposition significantly led by GrowthWorks. GrowthWorks also submits that, at a later stage in this process, when a shareholders' meeting or meetings of the VenGrowth Funds will be called, VenGrowth shareholders will receive an information circular and a form of proxy, both in compliance with applicable law. GrowthWorks submits that circular will provide VenGrowth shareholders sufficient information with respect to the GrowthWorks Proposal to make an informed decision.

### *b. Solicitation by GrowthWorks*

[43] We are required in this matter to consider the relatively fine distinctions between the nature and legal effect of a "proxy", the nature and legal effect of a power of attorney to vote shares and grant proxies, and the right of shareholders to agree with other shareholders or a third party as to how they will vote their shares.

[44] We believe that it is clear that GrowthWorks' solicitation of the Support Agreements constitutes a "communication to a security holder under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy" within the meaning of the definition of "solicitation" in section 84 of the Act. In substance, the Support Agreements are being used as a means to permit GrowthWorks to vote the Subject Shares, personally or by proxy, at any meeting of VenGrowth shareholders that may be called to consider the GrowthWorks Proposal or any competing transaction. That solicitation would likely

ultimately result in the procurement or withholding of a "proxy" in respect of any VenGrowth shareholders' meeting that may be called to consider the GrowthWorks Proposal or any competing transaction.

### *c. Are the Support Agreements Proxies?*

[45] The legal question we must address, however, is whether that solicitation currently constitutes a solicitation of a "proxy" from the holders of VenGrowth shares within the meaning of subsection 86(1) of the Act. The Special Committee submits that the Support Agreements are proxies within the meaning of the Act because they are powers of attorney permitting GrowthWorks to vote the Subject Shares at VenGrowth shareholder meetings. This submission rests on the view that, in these circumstances, there is no difference in the legal effect of a proxy and of a power of attorney: both authorize the holder to vote VenGrowth shares at a shareholders' meeting.

[46] GrowthWorks submits, however, that there are important legal differences between a proxy and the Support Agreements. The Support Agreements are agreements entered into between GrowthWorks and the VenGrowth shareholders to support the GrowthWorks Proposal and they provide broader authority than is represented by a proxy for voting at a specified meeting. The Support Agreements authorize the requisitioning of shareholder meetings as well as the voting of the Subject Shares at multiple future meetings of the VenGrowth shareholders. Further, GrowthWorks submits that they are agreements entered into for consideration or under seal, unlike a proxy for which no consideration is given. (We note that counsel for the Special Committee disputed whether consideration was given for those agreements and whether they were made under seal. We do not find it necessary to resolve those issues.)

[47] GrowthWorks refers to subsection 148(2) of the CBCA and says that section requires a proxy to be executed by "the shareholder or by the shareholder's attorney authorized in writing". GrowthWorks submits that section thereby recognizes the difference between a proxy and a power of attorney to grant a proxy. GrowthWorks submits that the Support Agreements constitute powers of attorney to execute or grant proxies but are not themselves proxies. GrowthWorks says that the Act and the CBCA do not apply to the solicitation of powers of attorney, they apply only to solicitations of proxies.

[48] A "proxy" is defined in subsection 1(1) of the Act as "a completed and executed form of proxy by means of which a security holder has appointed a person … as the security holder's nominee to attend and act for and on the security holder's behalf at a meeting of security holders."

[49] A "form of proxy" is defined in the Act as "a written or printed form that, upon completion and execution by or on behalf of a security holder, becomes a proxy". Section 9.4 of National Instrument 51-102 - *Continuous Disclosure Obligations* ("**NI 51-102**") imposes specific requirements as to the form of a proxy. However, there is no requirement under Ontario securities law that a proxy be revocable (see paragraph 56 of these reasons).

[50] There is some circularity in the definitions of "proxy" and "form of proxy". Clearly, a proxy is an instrument by which a security holder can appoint a person to attend and act on the security holder's behalf at a meeting of security holders. However, little guidance is provided by the provisions of the Act on the question of whether agreements such as the Support Agreements can themselves constitute proxies.

[51] In coming to our decision, we have reviewed the proxy solicitation cases submitted to us by the parties, although we did not find them helpful on the specific question of whether the Support Agreements themselves constitute proxies (those cases include *SEC v. Okin*, (1943) 132 F.2d 784 (2d Cir.); *Studebaker Corp. v. Gittlin*, (1966) 360 F. 2d 692 (2d Cir.); *Capital Real Estate Investors Tax Exempt fund Limited Partnership v. Schwartzberg*, (1966) 917 F. Supp. 1050 (S.D.N.Y.); *Pacifica Papers Inc. v. Johnstone* (2001), 15 B.L.R. (3d) 249 (B.C.S.C.), affirmed (2001), 19 B.L.R. (3d) 62 (B.C.C.A.); *Polar Star Mining Corp. v. Willock* (2009), 96 O.R. (3d) 688 (Ont. S.C.); *Brown v. Duby* (1980), 11 B.L.R. 129 (Ont. H.C.); *Calumet Industries, Inc. v. MacClure*, (1978) 464 F. Supp. 19 (N.D. III.); and *Montreal Trust Co. of Canada v. Call-Net Enterprises Inc.* (2002), 57 O.R. (3d) 775).

[52] On balance, it seems to us that the Support Agreements are not proxies. The Support Agreements authorize GrowthWorks, among other things, to execute proxies as attorney for VenGrowth shareholders to vote at shareholders' meetings; but the Support Agreements are not themselves proxies. Certainly, the Support Agreements do not comply with the form requirements for a proxy and are not documents intended to be lodged at a meeting of shareholders as a proxy. The Support Agreements are agreements between the parties constituting GrowthWorks as attorney for the VenGrowth shareholders for certain purposes. Accordingly, in our view, the solicitation of the Support Agreements was not illegal or contrary to Ontario securities law.

### *d. Solicitation of the Support Agreements is Contrary to the Public Interest*

[53] In substance, however, the solicitation of the Support Agreements is at its core the solicitation of the right to vote shares held by VenGrowth shareholders at VenGrowth shareholder meetings called to consider the GrowthWorks Proposal or any competing transaction. A very large number of shareholders were solicited (130,000 VenGrowth shareholders) and each of those shareholders held a relatively small number of shares. Shareholders were solicited to enter into a standard form agreement and there was no negotiation between the parties as to the terms of that agreement. This solicitation process is quite different from the usual process under which so-called "lock up agreements" are negotiated and entered into between a potential acquirer and a significant shareholder of a target issuer. Accordingly, there is little difference between the process of solicitation of the Support Agreements and the solicitation of proxies entitling the holder to vote at a shareholders' meeting.

[54] Further, if a shareholder enters into a Support Agreement then, by its terms, that shareholder cannot vote the Subject Shares by proxy or otherwise at any VenGrowth shareholders' meeting thereafter called to consider the GrowthWorks Proposal or any competing transaction. The Support Agreements are expressed to be irrevocable, thereby preventing a shareholder who enters into a Support Agreement from changing his or her

mind as to how the Subject Shares should be voted. Accordingly, a shareholder has no ability to choose between the GrowthWorks Proposal and any competing transaction that may arise, including the proposed Covington transaction.

[55] We note, in this respect, that the CBCA provides that a proxy is valid only at the meeting in respect of which it is given or any adjournment of that meeting (subsection 148(3)) and that a shareholder may revoke a proxy in the manner provided for in the CBCA (subsection 148(4)).

[56] Ontario securities law does not require that a proxy be revocable. In this respect, Form 51-102 F5 – Information Circular to NI 51-102 requires that an information circular:

> State whether the person or company giving the proxy has the power to revoke it. If any right of revocation is limited or is subject to compliance with any formal procedure, briefly describe the limitation or procedure.
>
> (Item 2 of Part 2 of Form 51-102 F5)

[57] In contrast, the take-over bid rules in the Act permit a security holder to withdraw securities deposited under a bid at any time before the securities have been taken up by the bidder. As a result, security holders have a broad right to change their decision whether to deposit their securities pursuant to a take-over bid. That right of withdrawal is crucial where a competing take-over bid is made.

[58] The comparable right in the context of a merger or acquisition transaction requiring shareholder approval is the right of shareholders to change their vote by revoking any proxy they may have granted. That right is crucial to shareholders in circumstances in which there may be competing proposals or transactions.

[59] Accordingly, the right of shareholders to revoke a proxy or other voting authority, such as the Support Agreements, in circumstances such as those before us, is fundamental to protecting the interests of those shareholders. In our view, the principles underlying the take-over bid and proxy solicitation provisions of the Act require that a shareholder be able to make an informed decision as to how to vote, and that a shareholder be able to change that decision, if the shareholder wishes to do so. The Support Agreements by their terms prevent a shareholder from choosing between competing proposals or transactions. Accordingly, in our view, the solicitation of the Support Agreements, and the terms of those agreements, undermine one of the animating principles of the Act.

[60] In our view, the solicitation of the Support Agreements in these circumstances, and the voting of the Subject Shares under those agreements, is contrary to the public interest and engages our public interest jurisdiction under section 127 of the Act.

[61] Shareholders who have entered into Support Agreements should be entitled to terminate those agreements at any time for the purpose of voting the Subject Shares at any VenGrowth shareholders' meeting called to consider the GrowthWorks Proposal or any competing proposal or transaction. Further, any subsequent valid submission by a VenGrowth shareholder of a proxy for voting on such matters should constitute an automatic

revocation of the right to vote under the Support Agreement on that matter. It was unnecessary for us to address these specific matters in our Order given our conclusion in paragraph 67 of these reasons.

[62] Given the efforts by GrowthWorks to provide substantial relevant disclosure in the GrowthWorks Circular, we have not concluded that the solicitation of the Support Agreements in these circumstances was abusive of shareholders or the capital markets.

***e. Disclosure Matters***

[63] We heard submissions from the Special Committee and the VenGrowth Managers with respect to what they considered to be material deficiencies in disclosure or material misrepresentations in the GrowthWorks Circular. We are not in a position, based on the evidence before us, to come to any conclusions with respect to those matters. We expect GrowthWorks to appropriately address any outstanding disclosure issues in any amendment or supplement to the GrowthWorks Circular that GrowthWorks may decide to circulate or in any subsequent information circular sent by GrowthWorks to VenGrowth shareholders in connection with a shareholders' meeting to consider the GrowthWorks Proposal. We are not, however, making any order in this respect or imposing any such requirement.

[64] We also heard submissions from Staff as to the various questions that the GrowthWorks Circular fails to adequately address or answer. Those submissions related, for instance, to questions around determining the purchase price payable under the GrowthWorks Proposal, failure to disclose the potential amounts of termination fees that could become payable to the VenGrowth Managers, the manner of calculation of the management expense ratios of the GrowthWorks funds and the failure to provide a more detailed merger agreement that can be compared with the Covington transaction. Staff submits that they cannot resolve these disclosure issues without further discussions with GrowthWorks.

[65] In our view, it is important that we not unduly interfere with the rights of the VenGrowth shareholders to support the GrowthWorks Proposal if that is what they wish to do. Because the GrowthWorks Proposal is a proposal for a hostile merger, GrowthWorks may face challenges with respect to access to information related to the VenGrowth Funds and its ability, at this stage of the process, to create certainty around certain elements or terms of its proposal. As long as there is adequate disclosure of such uncertainties and the risks of them, they should not prevent GrowthWorks from presenting a proposal to VenGrowth shareholders or prevent those shareholders from voting to support that proposal. Provided the VenGrowth shareholders can make an informed decision based on the disclosure made to them, it is ultimately up to them to decide how they will vote or which proposal or transaction they will support. We note, in this respect, that VenGrowth has an obligation to disclose to VenGrowth shareholders, in connection with any VenGrowth shareholders' meeting that may be called to consider the GrowthWorks Proposal, any information that would reasonably be relevant to shareholders in considering that proposal. GrowthWorks and VenGrowth have not been reticent in criticising each other's disclosure in connection with this matter.

### *f. Subsequent Shareholders' Meetings and Voting*

[66] In our view, if GrowthWorks wishes to proceed with the GrowthWorks Proposal, (i) a meeting or meetings of VenGrowth shareholders should be requisitioned in due course to consider the GrowthWorks Proposal, and (ii) a new information circular containing sufficient information to permit VenGrowth shareholders to make an informed decision should be sent to VenGrowth shareholders, together with a form of proxy that is in compliance with applicable law.

[67] Further, in our view, none of the Subject Shares should be voted by GrowthWorks or its related entities in connection with any VenGrowth shareholders' meeting or meetings to consider the GrowthWorks Proposal or any competing transaction. We reach that conclusion on the basis that the GrowthWorks Circular may provide insufficient information, at this stage of the process, to permit VenGrowth shareholders to make an informed decision as to how those shares should be voted on the GrowthWorks Proposal. Staff submits that is the case. Counsel for GrowthWorks acknowledges that a subsequent solicitation of proxies, with appropriate disclosure, would be required in connection with any GrowthWorks merger proposal ultimately put to a shareholder vote. In our view, GrowthWorks should not be entitled in these circumstances to vote the Subject Shares because (i) the right to do so was obtained based on the information contained in the GrowthWorks Circular, which may not be adequate, at this stage of the process, to permit VenGrowth shareholders to make an informed decision, and (ii) the voting rights were obtained in connection with a solicitation that undermined an animating principle of the Act related to take-over bids and proxy contests that is intended for the protection of shareholders. In these circumstances, GrowthWorks should not be permitted to vote the Subject Shares and thereby influence or determine the outcome of a VenGrowth shareholder vote.

[68] Nothing in these reasons prevents GrowthWorks from relying on the Support Agreements to requisition any meeting or meetings of VenGrowth shareholders or from soliciting proxies in connection with any such meetings.

## 8. OTHER MATTERS

[69] For greater clarity, our conclusions in this matter reflect the following principles or assumptions:

> (1) GrowthWorks is not required to participate in the Special Committee auction process if it does not wish to do so. GrowthWorks may face challenges in advancing the GrowthWorks Proposal on a hostile basis, but that should not prevent GrowthWorks from making a proposal or proposals directly to VenGrowth shareholders. VenGrowth shareholders may well consider those proposals to be in their best interests.
>
> (2) We have no reason to believe that the Special Committee process to solicit competing transactions is not being carried out appropriately and diligently. That process has been successful in obtaining a possible competing transaction from

Covington. Accordingly, the VenGrowth shareholders have benefited from the Special Committee process.

(3) In our view, the proxy solicitation rules are intended for the benefit and protection of shareholders and those rules should be interpreted and applied to further the fundamental rights of shareholders and not to frustrate those rights.

(4) It is not for us to assess or attempt to determine the financial or economic desirability of any particular proposal or transaction for the acquisition of the VenGrowth Funds. That is ultimately a matter for the VenGrowth shareholders to decide.

[70] Nothing in these reasons shall restrict Staff in any way in considering whether to approve any acquisition of the VenGrowth Funds under National Instrument 81-102 - *Mutual Funds* or in applying the proxy solicitation requirements of Ontario securities law to any solicitation of proxies by GrowthWorks or the VenGrowth Funds. In particular, Staff is entitled to assess whether any disclosure made by GrowthWorks or the VenGrowth Funds in connection with this matter, including any disclosure made prior to this hearing, is in compliance with applicable law, and to determine whether any other action should be taken in that respect.

## 9. CONCLUSION

[71] To give effect to our conclusions, we issued the Order attached as Schedule "A" on June 9, 2011. In our view, the issue of that order was in the public interest.

DATED at Toronto this 14th day of June, 2011.

| | |
|---|---|
| *"James E. A. Turner"* | *"Mary G. Condon"* |
| James E. A. Turner | Mary G. Condon |

**SCHEDULE "A"**

Ontario Securities Commission | Commission des valeurs mobilières de l'Ontario | P.O. Box 55, 19th Floor 20 Queen Street West Toronto ON M5H 3S8 | CP 55, 19e étage 20, rue queen ouest Toronto ON M5H 3S8

**IN THE MATTER OF THE *SECURITIES ACT*, R.S.O. 1990, c. S.5, AS AMENDED**

**- and -**

**IN THE MATTER OF AN APPLICATION BY THE SPECIAL COMMITTEE OF DIRECTORS OF THE VENGROWTH FUNDS**

**- and -**

**IN THE MATTER OF GROWTHWORKS CANADIAN FUND LTD. AND GROWTHWORKS LTD.**

**ORDER**
**(Section 127 of the *Act*)**

**WHEREAS** The VenGrowth Investment Fund Inc., The VenGrowth II Investment Fund Inc., The VenGrowth III Investment Fund Inc., The VenGrowth Advanced Life Sciences Fund Inc. and the VenGrowth Traditional Industries Fund Inc. (collectively, the "**VenGrowth Funds**") are registered as labour-sponsored venture capital corporations under the *Income Tax Act (Canada)* ("**LSVCCs**");

**AND WHEREAS** each of the VenGrowth Funds is a mutual fund and reporting issuer under Ontario securities law;

**AND WHEREAS** GrowthWorks Canadian Fund Ltd. ("**GrowthWorks**") is an LSVCC and a mutual fund and reporting issuer under Ontario securities law;

**AND WHEREAS** on May 2, 2011, the Special Committee of Directors of the VenGrowth Funds (the "**Special Committee**") applied to the Ontario Securities Commission (the "**Commission**") for an order under paragraphs 2 and 5.ii of subsection 127(1) of the Ontario *Securities Act*, R.S.O. 1990, c. S.5 (the "**Act**") prohibiting GrowthWorks and GrowthWorks Ltd. from continuing to solicit VenGrowth shareholders and from taking further steps in pursuit of its proposed acquisition of the VenGrowth Funds, unless it complies with Ontario securities law and applicable corporate law (the "**Application**");

**AND WHEREAS** we heard the Application on June 1 and June 2, 2011 (the "**Application Hearing**");

**AND WHEREAS** VenGrowth Capital Management Inc., VenGrowth II Capital Management Inc., VenGrowth III Capital Management Inc., VenGrowth Advanced Life Sciences Management Inc., and VenGrowth Traditional Industries Management Inc. (collectively, the "**VenGrowth Managers**") applied for and on consent were granted limited intervenor status under Rule 1.8 of the Commission's *Rules of Procedure* (2010), 33 O.S.C.B. 8017;

**AND WHEREAS** counsel for VenGrowth, GrowthWorks, the VenGrowth Managers and Staff of the Commission ("**Staff**") appeared at the Application Hearing and presented evidence and made submissions;

**AND WHEREAS** on March 14, 2011, GrowthWorks mailed an Information Circular (the "**GrowthWorks Information Circular**") and a form of support agreement (the "**Support Agreement**") to VenGrowth shareholders, filed them on SEDAR and posted them on a GrowthWorks website;

**AND WHEREAS** the Support Agreement purports, among other matters, to give GrowthWorks an irrevocable power of attorney to requisition meetings of the VenGrowth shareholders and to vote the VenGrowth shareholders' shares in favour of a proposal by GrowthWorks to buy the assets of the VenGrowth Funds in exchange for shares issued by GrowthWorks (the "**GrowthWorks Proposal**");

**AND WHEREAS** VenGrowth alleges that the GrowthWorks Proposal contravenes the proxy solicitation requirements of Ontario securities law and section 148 of the *Canada Business Corporations Act*; that it is inconsistent with the animating principles underlying the Act's requirements for take-over bids and proxy contests; and that GrowthWorks' public statements, including statements made in the GrowthWorks Information Circular, are incomplete and materially misleading;

**AND WHEREAS** GrowthWorks has received over 10,500 Support Agreements from VenGrowth shareholders representing over eight million VenGrowth shares and approximately 7.5 to 10.8 percent of VenGrowth shareholders (the "**Supporting Shareholders**");

**AND WHEREAS** on May 13, 2011, GrowthWorks announced its intention that, despite the irrevocable nature of the power of attorney granted by the Support Agreements, VenGrowth shareholders who have executed or will execute Support Agreements will be given the right to revoke the Support Agreements, or limit the authority granted to GrowthWorks under the Support Agreements to the requisition of shareholder meetings;

**AND WHEREAS** GrowthWorks submits that the GrowthWorks Proposal provides prospectus-level disclosure to VenGrowth shareholders, does not contravene Ontario securities law and is not abusive of the capital markets so as to justify the Commission intervening in the public interest;

**AND WHEREAS** we find that it is in the public interest to make this Order;

**IT IS ORDERED,** pursuant to subsections 127(1)2 and 127(2) of the Act, that any issuance of securities by GrowthWorks, GrowthWorks Ltd. or any related entity in connection with the GrowthWorks Proposal is cease traded (including all acts, advertisements, solicitations, conduct or negotiations directly or indirectly in furtherance of any such trade) unless and until:

(i) such time as GrowthWorks ceases to have any right, power or authority to vote, on any matter, the shares of the VenGrowth Funds that are or may become subject to the Support Agreements, and

(ii) GrowthWorks publicly announces that it has ceased to have any such voting rights;

provided that this Order shall not affect:

(a) the ability of GrowthWorks to requisition a shareholders' meeting or meetings of the VenGrowth Funds pursuant to the authority granted under the Support Agreements, or

(b) the ability of GrowthWorks to hereafter solicit, in accordance with applicable law, proxies for use at any shareholders' meeting or meetings of the VenGrowth Funds.

**DATED** at Toronto this 9th day of June, 2011.

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| *"James E. A. Turner"* | *"Mary G. Condon"* |
| _____ | _____ |
| James E. A. Turner | Mary G. Condon |