

# 2012 BCSECCOM 305

July 31, 2012

## **Headnote**

Multilateral Instrument 11-102 *Passport System* and National Policy 11-203 *Process for Exemptive Relief Applications in Multiple Jurisdictions* – National Instrument 81-102 *Mutual Funds* - A mutual fund seeks approval to suspend redemptions of its securities under Section 5.5(1)(d) of NI 81-102 - The fund will not resume distributions during the suspension period; the approval is for at most six months; the fund's independent review committee has or will approve suspending the redemptions; the fund will also suspend redemptions in Ontario; the fund will not make any new illiquid investments, except follow-on investments; the fund has filed or will file a material change report and has issued or will issue a press release announcing the suspension and the rationale for the suspension; the fund's board of directors will assess strategic options for managing the fund's liquidity

## **Applicable British Columbia Provisions**

National Instrument 81-102 *Mutual Funds* s. 5.5(1)(d)

In the Matter of  
the Securities Legislation of  
British Columbia  
(the Jurisdiction)

and

In the Matter of  
the Process for Exemptive Relief Applications in Multiple Jurisdictions

and

In the Matter of  
GrowthWorks WV Management Ltd.  
(the Filer)

and

In the Matter of  
GrowthWorks Canadian Fund Ltd.  
(the Fund)

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## Decision

### **Background**

- ¶ 1 The principal regulator in the Jurisdiction has received an application from the Filer on behalf of the Fund for a decision under the securities legislation of the Jurisdiction of the principal regulator (the Legislation) for approval under paragraph 5.5(1)(d) of National Instrument 81-102 *Mutual Funds* (NI 81-102) for the Fund to suspend the rights of securityholders of Class A Shares (as defined below) to request redemption of their securities (the Approval Sought). The Filer has applied for the Approval Sought to remain in effect until November 30, 2012.

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for a passport application):

- (a) the British Columbia Securities Commission is the principal regulator for this application, and
- (b) the Filer has provided notice that section 4.7(1) of Multilateral Instrument 11-102 *Passport System* (MI 11-102) is intended to be relied upon in Alberta, Saskatchewan, Manitoba, Quebec, Nova Scotia, New Brunswick, Newfoundland and Labrador, Prince Edward Island, Northwest Territories, Nunavut, and Yukon Territory (Passport Jurisdictions).

### **Interpretation**

- ¶ 2 Terms defined in National Instrument 14-101 *Definitions*, MI 11-102 and National Instrument 81-102 *Mutual Funds* have the same meaning if used in this decision, unless otherwise defined.

### **Representations**

- ¶ 3 This decision is based on the following facts represented by the Filer and the Fund:
- 1. the Fund is a corporation incorporated under the *Canada Business Corporations Act* by articles of incorporation dated February 29, 1988;
  - 2. the Fund is a registered labour-sponsored investment fund corporation under the *Community Small Business Investment Funds Act* (Ontario), a registered labour-sponsored venture capital corporation under the *Income Tax Act* (Canada) and *The Labour-Sponsored Venture Capital Corporations Act* (Manitoba) and an approved fund under the *Labour-sponsored Venture Capital Corporations Act* (Saskatchewan); the Fund's investing activities are governed by these statutes (collectively, the LSIF Legislation); the Fund is not in default of the LSIF Legislation;

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3. the Fund is a reporting issuer under applicable securities legislation of the provinces and territories of Canada and is not in default of securities legislation in any jurisdiction; the Fund's most recently filed prospectus is dated November 17, 2010, as amended by amendment no. 1 dated December 17, 2010, and was filed in Alberta, Saskatchewan, Manitoba, Ontario, Northwest Territories, Nunavut and Yukon Territory; the Fund last filed a prospectus in the Jurisdiction in January 2002;
4. the Filer, the manager of the Fund (Manager), is a corporation incorporated under the *Canada Business Corporations Act* by articles of incorporation dated October 24, 2002; the head office of the Filer is in Vancouver, British Columbia;
5. the head office of the Fund is in Toronto, Ontario;
6. the authorized capital of the Fund consists of:
  - (a) an unlimited number of Class A shares (Class A Shares) issuable in series, of which there are currently 23 series created and 17 series outstanding;
  - (b) an unlimited number of Class B shares (Class B Shares), of which 1,000 Class B Shares are outstanding, all of which are held by the Canadian Federation of Labour, the sponsor of the Fund; and
  - (c) an unlimited number of Class C shares (Class C Shares) issuable in series, of which there is one issued series designated as "IPA shares" and 100 of such shares are outstanding, all of which are held by the Filer to provide for a "participating" or "carried" interest in the venture investments of the Fund;
7. no Class B Shares or Class C Shares will be redeemed during the period in which the Approval Sought is in effect;
8. under legislation in effect in Ontario, regulatory approval is not required in order for the Fund to cease redemptions of the Class A Shares in Ontario;
9. the British Columbia Securities Commission is the principal regulator for this application since the head office of the Filer is in British Columbia;
10. the Fund ceased distributions to the public on September 30, 2011 and will not resume distributions of Class A shares during the period in which the Approval Sought is in effect;

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11. none of the Class A Shares, Class B Shares or Class C Shares are listed on an exchange;
12. as of June 30, 2012, the Fund has invested a total of \$606,077,624 (being the fair value of Fund's assets when the Filer was acquired by GrowthWorks Ltd. in November 2002, the fair value at closing of assets acquired by the Fund in merger transactions and the cost of the Fund's new and follow-on investments since November 2002) in small- and medium-sized Canadian businesses since it commenced distribution in 1991;
13. the investment objective of the Fund is to invest in small and medium sized businesses with the objective of obtaining long term capital appreciation and must make "eligible investments" in "eligible businesses" as prescribed under the LSIF Legislation;
14. the Fund's venture investment activity is currently focused on divesting holdings in its venture portfolio and providing follow-on financing to existing portfolio companies that require additional capital and the Filer believes have the greatest potential for exits at higher values; while the Approval Sought is in effect, the Fund will only make new venture investments in companies in which the Fund already holds an investment (or legal successors of those companies) where the Fund believes the investments are in the best interests of the Fund;
15. the net asset value of the Fund was \$181,326,204 on June 30, 2012 and the total value of assets held by the Fund was \$229,346,204 on June 30, 2012;
16. as of June 30, 2012, the Fund has made investments in 209 portfolio companies since November 2002 (when the Filer was acquired by GrowthWorks Ltd.); the Fund currently holds investments in approximately 59 companies; those investments now have an average age of over 8 years;
17. the Fund's portfolio companies are generally issuers which are not reporting issuers and in respect of which no secondary market exists for trading of the issuer's securities or are thinly traded reporting issuers; as at June 30, 2012, approximately 85.2% of the Fund's assets (by total value) is attributable to securities of private issuers, approximately 3.2% is attributable to divestment receivables (including escrowed divestment proceeds) and approximately 11.6% is primarily attributable to other receivables, cash and short term investments;

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18. purchasers of Class A Shares of the Fund were eligible for a federal tax credit equal to 15% of the purchase price subject to a maximum credit of \$750 upon an investment of \$5,000;
19. purchasers resident in Saskatchewan and Manitoba were eligible to receive a provincial tax credit equal to 20% and 15% of the purchase price, respectively, subject to a maximum credit of \$1,000 and \$1,800, respectively; purchasers resident in Ontario were historically eligible for an Ontario tax credit (the Ontario Credit) equal to 15% or 10% of the purchase price, subject to a maximum credit of \$750 upon an investment of \$5,000;
20. on September 30, 2005, the Ontario Government announced its intention to phase out the Ontario Credit by March 2012;
21. during the first eight years from issuance, the Class A Shares of the Fund may only be redeemed without repayment of the federal and provincial tax credits described above (a Tax Recapture Event) in very specific circumstances as set out in LSIF Legislation;
22. since inception, few investors have redeemed Class A Shares when the investor would have been subject to a Tax Recapture Event;
23. the Class A Shares of the Fund first became redeemable without a Tax Recapture Event in 1999, eight years after the Fund began distributing Class A shares;
24. the Filer estimates that the Fund currently has approximately \$124.4 million of Class A Shares currently eligible for redemption without a Tax Recapture Event, an additional \$16.6 million of Class A Shares will become eligible for redemption on or before March 31, 2013 without a Tax Recapture Event, and between March 31, 2013 and March 31, 2014 an additional approximately \$11.4 million of Class A Shares will become eligible for redemption without a Tax Recapture Event;
25. the Fund redeemed Class A Shares having an aggregate value of approximately \$41.0 million from August 31, 2010 to August 31, 2011, representing 15.2% of the net asset value of the Fund as at the August 31, 2010 year end of the Fund and redeemed Class A Shares having an aggregate value of approximately \$4.0 million from August 31, 2011 to June 30, 2012;
26. the Fund currently has outstanding Class A Shares redeemable at a total net asset value of approximately \$124.4 million without the holders of such shares incurring a Tax Recapture Event and payment of all these redemptions, if

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requested, would deplete all of the Fund's cash and cash equivalents on hand and require the Fund to pursue sales of illiquid investments, potentially at substantially discounted prices, if a purchaser could be found;

27. the Fund's Articles provide that, in any fiscal year, the Fund is not required to redeem Class A Shares having an aggregate redemption price greater than 20% of the net asset value of the Fund as at the last day of the preceding financial year; this redemption limit was described in the prospectuses under which the Class A Shares were distributed;
28. the Fund's venture investment activity is currently focused on divesting holdings in its venture portfolio and providing follow-on financing to existing portfolio companies that require additional capital and the Filer believes have the greatest potential for divestments at higher values; the net cash proceeds from divestments will be used to fund selected follow-on investments approved by the Fund's Investment Committee, to pay the Fund's ongoing operating expenses (including payment obligations under the Fund's financing arrangements and fees payable for contracted management services) and, provided the Fund meets the statutory requirements for doing so, to fund redemptions of Class A shares of the Fund;
29. at present, the Fund intends that, if the Fund generates sufficient cash proceeds through divestments from the Fund's venture investment portfolio, the Fund will return to processing redemptions of Class A shares of the Fund on a weekly basis within the terms disclosed in the Fund's prospectus (at least 20% of NAV of the Fund each year) by November 10, 2013 or, if the RMP (as defined in paragraph 33) is extended by the board of directors (Board of Directors) of the Fund as authorized by Class A shareholders of the Fund, by November 10, 2014; the Board of Directors will continue to review complementary and alternative strategies for maximizing shareholder value and providing liquidity to holders of Class A shares, which options would include a wind-up of the Fund if a wind-up is determined by the Board of Directors to be in the best interests of shareholders of the Fund;
30. the Fund continues to make selected follow-on investments in companies in which the Fund holds investments, is pursuing divestments from its venture investment portfolio and, subject to the Fund generating cash divestment proceeds sufficient to do so, intends to resume processing of Class A share redemptions and as such, the Manager and the Board of Directors believe the Fund is currently operating as a going concern;
31. as of the date of this order, the Fund has not defaulted and is not in default under the agreements governing the Fund's indebtedness;

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32. on November 10, 2011, the Fund closed Class A share redemptions;
33. on November 10, 2011, the Fund announced that its Board of Directors adopted a redemption management plan (RMP); under the RMP, the Fund will, subject to the Fund securing and maintaining necessary regulatory orders and having available cash to fund redemptions, process Class A share redemptions on dates and based on total redemption values determined by the Board of Directors after taking into consideration projected divestment activity and the Fund's follow-on investment needs and operating expenses (including payment obligations under the Fund's financing arrangements and fees payable for contracted management services); redemption values may be increased or decreased in the discretion of the Board of Directors if divestment activity exceeds or falls short of projected levels;
34. at a meeting held on June 28, 2012, Class A shareholders of the Fund approved the RMP, including the proposal to process Class A share redemptions on dates and based on values determined by the Board of Directors;
35. the shareholder resolution approving the RMP provides for the implementation of semi-annual redemption processing for the Fund's Class A shares until November 10, 2013 and authorizes the Board of Directors to extend semi-annual redemption processing for a further 12 months thereafter to November 10, 2014; any further extensions of the RMP would be subject to securing further shareholder approval;
36. the Board of Directors and the Manager believe that, in light of the decline in capital raising by the Fund over recent years and the lower than expected levels of divestments from the Fund's venture investment portfolio, the closure of Class A share redemptions and the method of distributing available cash in the manner contemplated by the RMP are in the best interests of the Fund;
37. the Board of Directors and the Manager believe that selling the Fund's portfolio investments in an orderly manner, rather than through a rapid liquidation of the Fund's portfolio investments as part of a wind-up, will allow the Fund to maximize the value realized from the Fund's venture investment portfolio;
38. net cash proceeds realized by the Fund upon the disposition of the Fund's portfolio assets from time to time are used to fund selected follow-on investments approved by the Fund's Investment Committee, to pay the Fund's ongoing operating expenses (including payment obligations under the Fund's

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financing arrangements and fees payable for contracted management services) and, provided the Fund meets the statutory requirements for doing so, to fund redemptions of Class A shares of the Fund; the allocation of such proceeds will be reviewed by the Board of Directors, taking into account a variety of factors, including the Fund's contractual obligations and applicable legal requirements;

39. the Fund and the Manager are parties to a Management Agreement dated July 15, 2006 (the Management Agreement) whereby the Manager has agreed to provide management and administration services to the Fund and to pay most of the Fund's normal operating expenses incurred in providing such services in exchange for the Fund paying the Manager fees prescribed under the Management Agreement and disclosed in the Fund's prospectus;
40. while the Management Agreement requires that such fees be paid monthly, in order to support the Fund's liquidity, the Manager has for over 18 months allowed the Fund to accrue varying amounts of fees payable under the Management Agreement; as at July 27, 2012, the amount of accrued fees payable to the Manager was \$2,105,052;
41. the Management Agreement is not being re-negotiated as the contractual obligations of the Manager remain the same as when the agreement was executed and the Manager continues to provide substantially all of the contracted services under the Management Agreement, except for those related to the offering of Class A Shares, and continues to pay most of the Fund's normal operating expenses incurred in providing such services;
42. other than fees charged in order to allow for the recovery of up-front commissions paid by the Manager in respect of sales of certain series of Class A shares occurring after 2003 (which fees are calculated by reference to the original purchase price of the shares), all management and administration fees payable under the Management Agreement are paid on the basis of the net asset value (NAV) of the Fund, after taking into account the liabilities of the Fund;
43. the Manager holds Class C shares of the Fund on which the Manager may become eligible to receive dividends (IPA Dividends) in connection with divestments from the Fund's venture investment portfolio, provided prescribed investment returns are met for the venture portfolio as a whole and for the divested investment; as at June 30, 2012, IPA Dividends in the amount of \$425,506 were owing to the Manager in respect of escrowed divestment proceeds released to the Fund and IPA Dividends in the amount of \$1,006,097



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would be payable in the event that all currently escrowed divestment proceeds are released to the Fund;

44. as at June 30, 2012, the total amount of liabilities of the Fund was \$42,683,051, including accrued management fees; of the total liabilities of the Fund as at June 30, 2012, the following amounts are owed under financing agreements (i) a total of \$14,692,782 represents principal and interest owing under a note financing facility, of which (A) up to \$9.5 million principal amount (plus interest) owing to Working Opportunity Fund (EVCC) Ltd. is repayable on December 20, 2012, and (B) \$4 million principal amount (plus interest) owing to Matrix Asset Management Inc., the parent company of the Manager, is repayable in equal portions of \$1 million on each of January 31, 2013, July 31, 2013, January 31, 2014 and July 31, 2014, and (ii) a total of \$26,470,284 represents amounts owing to Roseway Capital s.a.r.l. under a Participation Agreement dated May 28, 2010, which amount is due to be paid on May 28, 2013; the Fund's payment obligations under these financing arrangements are secured by a charge over the Fund's portfolio assets and/or proceeds from the sale of those assets;
45. the Fund does not currently intend to undertake any new financing or to amend any existing financing agreements;
46. the Filer will continue to manage the Fund in the best interests of the investors and the Fund;
47. the Fund ceased redemptions in Ontario at the same time it ceased redemptions in British Columbia and the Passport Jurisdictions; the Approval Sought will allow the Fund to treat all investors resident in each jurisdiction in the same manner;
48. as at June 30, 2012, approximately 64.8% of the Fund's Class A Shares are held by Ontario residents, 18.9% are held by Manitoba residents, 5.6% are held by Saskatchewan residents, 3.2% are held by Quebec residents, 2.2% are held by New Brunswick residents, 2.0% are held by Nova Scotia Residents, 1.2% are held by British Columbia residents and 2.2% are held by residents of other jurisdictions;
49. as at June 30, 2012, approximately 67.3% of the Fund's shareholders are Ontario residents, 10.0% are Manitoba residents, 6.4% are Quebec residents, 6.0% are Saskatchewan residents, 3.1% are Nova Scotia Residents, 2.3% are New Brunswick residents, 2.2% are British Columbia residents and 2.7% are residents of other jurisdictions;

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50. the Fund's independent review committee has reviewed the RMP and has made a positive recommendation that the RMP achieves a fair and reasonable result for the Fund;
51. the Filer applied for and received substantially similar relief by way of an order dated November 10, 2011, and amended on April 16, 2012, (the Previous Order) that expires on July 31, 2012; on November 28, 2011 the Filer made a passport application on a confidential basis to the Jurisdiction (as Principal Regulator) to request that the Previous Order be varied to allow the Fund to process redemptions of the Fund's Class A shares on a managed basis (the Pending Application); and
52. the Jurisdiction is reviewing the Pending Application and requires additional time to consider the Pending Application; the Filer and the Fund will continue to work with the Jurisdiction as it further considers the Pending Application.

### **Decision**

- ¶ 4 The principal regulator is satisfied that the decision meets the test set out in the Legislation for the principal regulator to make the decision.

The decision of the principal regulator under the Legislation is that the Approval Sought is granted, provided that the Fund:

- (a) continues to cease redemptions of Class A Shares in Ontario;
- (b) does not resume distributions of Class A Shares during the period in which the Approval Sought is in effect;
- (c) does not redeem Class A Shares during the period in which the Approval Sought is in effect, except in cases where (i) the holder of Class A Shares, or the annuitant under a trust that holds Class A Shares, becomes disabled and permanently unfit for work or becomes terminally ill, or (ii) the holder of Class A Shares acquired such Class A Shares from another person as a consequence of the death of such other person or the death of an annuitant under a trust that held such Class A Shares;
- (d) does not make any new or additional illiquid investments during the period in which the Approval Sought is in effect, except for venture investments in companies in which the Fund already holds an investment (or legal successors of those companies) where the Fund believes the investments are in the best interests of the Fund;

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- (e) complies with its continuous disclosure obligations under National Instrument 81-106 *Investment Fund Continuous Disclosure* during the period in which the Approval Sought is in effect;
- (f) files or has filed a material change report to reflect the continuation of the suspension of redemptions of the Class A Shares until November 30, 2012; and
- (g) promptly issues a press release announcing the continuation of the suspension of the redemptions of Class A Shares until November 30, 2012, and the reasons underlying this decision.

This decision terminates on the earlier of (i) the date on which the Fund resumes regular redemptions of Class A Shares in accordance with its prospectus in all jurisdictions, and (ii) November 30, 2012.

Andrew S. Richardson, CA  
Acting Director, Corporate Finance  
British Columbia Securities Commission