

## The Foundation Perpetuity Myth

The philanthropic community has a perpetuity obsession. Critics of perpetuity believe that preserving capital, restricting payout, and existing forever is the pernicious norm. Admittedly, for some foundations, perpetuity a sacred ideal, an aspiration that is sometimes unquestioned. Foundations that “spend-down” are valorized as rare entities that value community impact over capital. But the reality is more complex. There is a long history of foundations that aren’t perpetual, and in Canada they are now, arguably, in the majority.

### Perpetuity – A Legal Default

Perpetuity is a compelling legal concept. In the past the term was routinely used in gift agreements and charity founding documents without being properly thought through. How long, exactly, is perpetuity? Really, can property last forever without degrading? For many years perpetual was a word that was used as a legal default in charitable trusts. It is an aspiration, but also routinely used precedent language. A legal habit. And “habit”, as Samuel Beckett said, “is the ballast that chains a dog to its vomit”. (Just try to get that image out of your mind.)

The concept of perpetuity is medieval in origins and was encoded in trust law. Capital was land. It was held to produce income to pay for good works. While traditionally trusts for private benefit were time limited, charitable

trusts could be perpetual to provide long-term, future benefit. Perpetuity, or permanence, reflects an aristocratic world view. Politically, there is an encoded message of stability and continuity. Which may partly explain the reaction to the idea of perpetuity today by some critics.

### Is perpetuity the norm?

I believe that perpetuity is *not* the norm among Canadian foundations, at least in practice. A high percentage of private foundations are annual, flow-through entities. Others became “perpetual” because the pre-2010 10-year gift language in the Income Tax Act but aren’t being managed for perpetuity. Some are time limited, or spend-downs. Still others never get going or run out of steam. They either get revoked by CRA or apply for voluntary revocation.

The CRA charities database tells a story of foundation mortality, not perpetuity. Private foundations often have a limited life. As of July 2024, there have been 10,312 private foundations registered since 1967, and 3,476 or one-third are revoked and no longer exist. There are 6,836 are still registered, and 3,357 or 49% are less than 15 years old.

### Headline Examples

Foundations with public, limited durations are, however, getting headlines.



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One example is the 70-year-old Ivey Foundation, which announced it was spending down its \$100 million endowment in five years “to enhance its efforts to advance Canada’s net-zero economy and increase the capabilities of the Foundation’s core partners on the front lines of Canada’s climate and energy transition.” This is bold and responsive, but it is not by any means the only example of Canadian spend-down foundation.

A new and large private foundation in Canada is The Waltons Trust, which is a self-described “limited life grant-making foundation”. It was founded by David Graham, the former owner of the cable company, Cablecasting that was sold to be bigger rival 20 years ago. Mr. Graham died in 2017 with no children. The foundation now has over \$100 million and is run by trusted friends and associates.

### Quiet examples

But not all Canadian examples are as public, and some are even larger. Aqueduct Foundation has a \$180 million spend-down fund that is quietly granting to zero. The R. Samuel McLaughlin Foundation, established by the founder of General Motors in Canada, granted out \$100 million dollars in the early 2000s. Its founder had placed a 50-year sunset deadline on the entity. It quietly granted all its capital and closed shop.

### Flexible foundations

The recent growth in the number and value of private foundations in Canada is certainly driving examination of “spending pathways”. There is a contemporary bias that a spending plan needs to be clearly established at the outset, alongside mission, vision and values. A recent article in The Philanthropist Journal funded by the newly-minted Definity Insurance Foundation explores various options. Unfortunately, the U.S. experience is so much better publicized and documented, and this paper misses many Canadian examples. It also mislabelled a common, non-doctrinaire model: the flexible foundation.

The article uses the term “accidental spend-down”, which I believe is both wrong and pejorative. I think most foundations are flexible and evolve over time, and that is a good thing. A flexible endowment is one that has capital but also uses it along with investment returns over time to maximize public impact. A rigidly defined foundation timeline is unnecessary. Indeed, it may extend over two or three generations,

but that is different than truly perpetual.

### **An unrecognized norm**

Many well-known, established Canadian private foundations are on a slow, unannounced spend-down. Why? Because they spend more than the minimum annual 5% disbursement quota each year. They spend at a rate that is greater than the historical rate of return. They are also human institutions that can run out of steam due to inter-personal dynamics.

A minority of foundations have explicit spend-down mandates or sunset dates. By analogy only a small minority of people know their date of death, or companies know when they will go out of business. That’s OK. Labelling flexibility as “accidental spend-down” downgrades the importance of engaged, dynamic philanthropy that changes over time. The emphasis should be on philanthropic responsiveness and finding the right balance between current and future community needs.

Sure, flexible foundations have invested capital and will be around for a long-time, but many foundation boards like the option to grant and spend beyond the minimum annual disbursement quota of 5% per annum. They are committed to charitable benefit and impact. These foundations may appear permanent, but they will evolve, and change. They won’t last forever, and that’s fine. They do their work quietly and effectively.

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