Buying and Selling Professional Services*

David Allgood, Peter Corcoran, Michael O'Connor, and Nick Pantaleo

David Allgood. Royal Bank of Canada, Toronto. BA (1970), LLB (1974) Queen's University. Former member of the Joint Committee on Taxation of the Canadian Bar Association (CBA) and Chartered Professional Accountants Canada (formerly the Canadian Institute of Chartered Accountants); member of the Dean's Advisory Committee, Queen's University Law School.

Peter Corcoran. Deloitte LLP, Toronto. BBA, York University; CPA, CA.

Michael O'Connor. Sun Life Financial Inc., Toronto. BA, Simon Fraser University; CPA, CA. Governor, Canadian Tax Foundation.

Nick Pantaleo. Rogers Communications Inc., Toronto. FCPA, FCA. Former governor, Canadian Tax Foundation; past president, Canadian branch, International Fiscal Association. Recipient of the Canadian Tax Foundation's Douglas J. Sherbaniuk Distinguished Writing Award (1997). Former co-editor, International Tax Planning feature, *Canadian Tax Journal*. Frequent speaker and writer on tax matters.

Abstract

Understanding the motivations and challenges that buyers and sellers of professional services face is not only useful but imperative in order for both to succeed. The panellists explore practical ways of measuring value, and they examine the differences between tax opinions and tax guidance and advice; the role of Sarbanes-Oxley; contingency fee arrangements; the issue of privilege; and the evolving role of technology.

Keywords Tax departments; selling; buying; privilege; accountants; lawyers.

Nick Pantaleo: "Buying and selling professional services"—why is such a session being held at the Canadian Tax Foundation's annual conference? Selling is something that tax practitioners from both accounting and legal firms do in one form

* This paper is an edited transcript of a panel discussion presented on November 25, 2013.

or another every day. It is something that they very much have to do, given the plethora of new tax rules and regulations, many of which are reshaping the buying and selling of professional services, especially tax services. Notwithstanding these developments, very little has actually been written on this subject.

The technical knowledge that we acquire at the annual conference is certainly valuable, but that alone is not going to improve one's individual quality of life, unless one has a successful spouse or wins the lottery. "How do I find work?" is a question that is being asked more frequently, certainly by younger and less established practitioners.

Buyers of professional services also have challenges. They need to know when to buy, what to buy, and how to buy from different service providers. Buyers of professional services are themselves sellers—internal sellers, who usually have to broker or tailor external ideas to meet the needs of the business or to convince business associates that buying a particular service is something that the organization should do. External sellers in accounting and legal firms need to understand the culture and buying dynamics of a particular organization.

Accordingly, understanding the motivations and challenges that buyers and sellers of professional services face is not only useful but essential in order for both to succeed.

For the most part, the panelists have been associated chiefly with large accounting and legal firms and large Canadian public companies. Nonetheless, we will try to address areas where we think situations are different for smaller companies. We will begin our discussion by looking first at the current environment for buying and selling professional services and asking you, David, as the elder statesman on this panel, for your reflections on what has changed over the last 20 to 30 years.

David Allgood: My most recent experience is largely in the legal arena, but there are lessons in that venue that cut across the provision of all professional services, particularly with respect to some of the trends in recent years. Clearly, we had the financial crisis in 2008, and we had the mini- or great recession, depending on where you are and how you looked at it, which heightened the cost pressures on buyers of professional services like myself. Large companies have chief financial officers who are continually putting cost pressures on us.

Hourly rates have continued to climb certainly in the legal arena. In the last few years we topped $1,000 an hour in some jurisdictions (or 1,000 units in local currency equivalents). In London, New York, and Toronto, it's 1,000, depending on the unit and ignoring any currency differences. As a consequence, people began to think seriously about the inefficiency of the hourly model because of the cost pressures and, at least on the legal side of business, began to question whether there were alternative ways of obtaining these services.

Another important element was the growth of the in-house bar and the in-house tax groups. I left private practice 15 years ago, and came in-house to do tax and then law after that. From my vantage point, there has been a dramatic increase in the size and sophistication of the in-house groups, which has had a big impact on the way that outside services are obtained and provided. The in-house purchasers are becoming more selective and, as I said, more sophisticated about those areas in which they can gain an advantage from their outside service providers.

Another important element is the Internet and the democratization of information generally. In the legal profession, it was said that the lawyers had the keys to the library. The Internet has blown the doors off the library, and I would say that's equally true in the tax and legal practices. The sheer accessibility of knowledge—not necessarily the interpretation of that knowledge, but its accessibility—has increased dramatically. That accessibility has led to what one might refer to as the disaggregation of services. In the past, a particular legal problem or tax problem was dealt with by the same group of professionals from beginning to end. Today, however, parts of it are broken down and solutions are provided in new ways. Parts of a legal or tax problem are being viewed as commoditized or process-oriented. We are seeing the rise of alternative service providers—legal process outsourcers—in the legal business. The result is that the breakdown or disaggregation of the problem might be viewed on a continuum ranging from standardized services all the way up to highly specialized, or bespoke, services.

Those are the major trends that have been playing out. Even the increases in predictive coding and artificial intelligence are changing the way in which services are bought and priced.

Peter Corcoran: I would like to talk about my perspective from having been on both sides of the fence. The first "aha" moment for me would have been the realization that ideas and concepts are fairly easy to come up with in tax planning. However, the actual implementation of something in a real business context is the challenge. One thing that shocked me in industry was the number of times that advisers would show up and want to discuss either a tax or a financial product, but had next to no idea about our business model, our operations, or how we functioned as a company. That, to me, was an eye-opener. Many advisers have an answer and are looking for a question to fit the answer, rather than taking the time to understand what questions the company really needs answered.

In a perfect world, an adviser understands the business to which he or she is trying to sell services or deliver value. It is important to understand the business and the realities and constraints facing that business. The other thing that I found critically important—and I recognized this when I was on the selling side—is that it is very important that you know what performance measures are used in the business—including the measures for the business units as well as for the tax function. It is probably shocking to all of us that tax is often a below-the-line item in performance management. The people in the business are often evaluated before tax, but the costs to deliver tax services are above-the-line costs. This is a challenge in selling something into an organization or creating a value proposition when, for the person you are trying to take that opportunity to, it is actually a negative in the evaluation. That doesn't mean that you can't deliver value to those people, but you need that context as you move forward and build it into the value proposition.

Another dynamic that we are seeing in our business right now is that much more of the tax advisory spending is being linked to risk and governance. In the past, tax people would chase cash tax savings or effective tax rate reductions. Now we see clients who want us first to help them build a risk framework in order to evaluate a tax plan before trying to execute it. So now a part of our tax service is to create the risk framework and build the underlying support around it. We will talk more about some of this, but it clearly is a trend.

We have also seen that the Canada Revenue Agency (CRA) is now approaching its audits from a risk-based perspective. We continue to read about the tax affairs of major companies on the front page of the *Wall Street Journal*. We have seen the United Kingdom pursue companies from a social responsibility standpoint. The managing of tax within a defined risk environment is a trend that will have an impact on the buying and selling of tax services.

Michael O'Connor: Certainly there has been a lot of change if one looks back 30 years. There was a time when accountants and lawyers couldn't sell services in the same way that we do today, because it was viewed as unprofessional to do so. Fast forward to today, and we see law firms advertising on television. When a client buys tax services today, it must consider tax shelter registration, Sarbanes-Oxley (with so few audit firms it is often difficult to figure out which one audits some part of a corporate group and what the rules are), the reporting of uncertain tax positions, and transparency. Procurement departments are aggressive about trying to ensure that promised value is being delivered and that agreed-on rates are being observed.

The focus today on aggressive tax planning is a whole new area that affects the buying and selling of tax services. The way in which engagement letters are written, for example, will come under the scrutiny of tax authorities that want to see whether there are any contingent fees or protections against loss in the engagement letters, which, according to recent legislative proposals in Canada, are hallmarks of aggressive tax planning. Increased audit committee oversight has spawned more questions about tax than in the past. Add to this a heightened understanding of tax accounting precision, which auditors have become acutely good at spotting over the last 5 to 10 years with the advent of the Public Company Accounting Oversight Board and its Canadian counterpart, the Canadian Public Accountability Board.

Despite these changes, if I reflect on the lessons that I can impart to you about selling (whether selling internally or externally), I think that not much has changed. What I have witnessed over the years—even on the part of many of the people in this room—is a core model that works. I call this model the “five S model.”

I have entertained advisers for years with a rant about this traditional sales model for professional tax services and how their approach compares with this model. It may well be applicable to other disciplines, but it is particularly apropos in the field of taxation services. So today I am going to leave this key lesson with you all and present to you the “five S model.”

The first S is the situation. Every purchase and sale of professional tax services starts with a situation, which can’t be contrived or manufactured. It can be a cold call, but the cold call may not work every time (or ever). But the situation exists any time you encounter a client or engage in a particular discussion about any topic. You may find yourself in a situation any time and any place, and you have to recognize the situation as a potential buying or selling opportunity. But remember this: all sales require a buyer, and all buyers require a counterparty to buy from. You should look at selling as helping people buy.

On the buyer’s side, the situation may arise from an internally created situation such as a takeover, a sale of a business, a tax audit reassessment, or some other event that threatens value. From the service provider’s perspective, a situation may be created by a change in the law, a tax case, the emergence of a new idea, or a connection of the three elements of what I call the triangle of certainty (facts, skill, and time) into a value proposition of some sort. All of these situations need to be managed, and the discipline of the buyer and seller will affect how the situation unfolds and how it progresses through the sales cycle.

The next step is critical, because if you go to the next step, you can’t stop the cycle; you have to be committed to it. And you have to be very certain. I call this next S the scare, because you need to scare the buyer enough to trigger the essential buying impulse. Perhaps the situation the buyer is in will result in additional taxation or create non-exempt surplus, or perhaps there could be a foreign exchange effect.

The second S is very important, but you can’t just scare the buyer. Many sellers think that they can always scare me. But the fear engendered at this stage of the sales cycle must be balanced with a certain amount of hope to keep the sales cycle moving. Words and phrases like “no,” “cannot be done,” and “it does not work that way” will undo many sales efforts. This second S is about managing expectations. It is very important to avoid the “overpromise/underdeliver” death spiral. The point when the axis of fear crosses the axis of hope will signal the beginning of the next stage of the cycle, the third S—the stall.

Most situations manifest themselves in brief encounters, and accordingly no tax buyer expects an immediate answer. Equally, no tax adviser is equipped, in the complexity of the tax world today, to provide immediate answers to all situations. Thus, the stall is a make-or-break stage in the cycle. Invoking the stall gives a buyer a chance to rethink either the service delivery landscape (potentially giving rise to involving the procurement group), the situation, and his or her own fears and hopes. But it also gives the seller a chance to obtain the essential facts necessary to defining and securing an engagement (which itself spawns a series of internal risk management processes for the buyer and seller). During the stall, you will want to gather some facts. The stall demonstrates whether the provider knows the threshold issues and is in a position to resolve the situation.

The stall sets up the fourth S, which is the study. The study is generally the heart of the engagement; the facts are introduced to the right skills and are blended with time to reach a level of certainty that is adequate for the client's situation. The study requires a deep evaluation of relevant facts in search of the kernel of truth that sparks the creation of value that generates the satisfaction of a client's needs and leads to the fifth S, the save.

I have found that in the stall and study periods, you think about a number of things: you think about the facts, and you come up with something that will ultimately save the day. The save is the true essence of satisfying client needs in a way that will secure more opportunities to serve and will pave the way for future sales cycles and increased levels of trust and value. The save occurs when the value at stake is identified and a feasible means to capture it is determined. It generally requires execution, and the save must not be declared before it is in hand. In the area of taxation it is particularly fragile, given long reassessment periods and the possibility of tax authorities challenging the savings.

And so the cycle keeps repeating itself, file after file, year after year. Then you go in-house and face it from that side of the fence. The cycle is scalable, and I think that you can use it, but you have to be very careful and remember the fable of the boy who cried wolf. Don't be the boy who cried wolf.

Nick Pantaleo: Michael, when you seek external advice, what exactly are you buying?

Michael O'Connor: We are buying certainty, or some level of certainty. From the buyer's perspective, I ask, "What does that certainty look like?" and "Why do I require certainty, and how much certainty is enough?"

That inquiry leads me to think about the core dimensions of the tax practice and the delivery of service. I see three elements reappear in situation after situation: facts, skill, and time. From my perspective, sitting inside and representing a taxpayer, I own all of the facts. Shame on me if I don't know what the facts are. Our team has some skill internally, but we have no time because we are not really staffed for all of the potentialities that will come along each year. The accounting and law firms, on the other hand, have nothing but time, and time is like electricity—it is difficult to store. The firms also have a ton of skill, but they have no facts. Marrying these positions—where the clients are long on facts but short on time and skill and the firms are long on time and skill—creates a symbiosis between the firms and clients and results in the acquiring and delivering of tax services.

I often talk to young practitioners about the need to know the facts of the situation. It's critical to know the facts. If you're inside an accounting or law firm and you know the facts, then you become the go-to person for the client.

When I think about that triangle of facts, skill, and time, I realize that what we are buying is a degree of certainty, and it generally comes to us in the form of guidance, advice, or an opinion.

The lowest level of certainty is guidance, and I will often seek guidance formally or informally, to get some feedback and direction. The next level is advice, which tends to be a little bit more robust in its delivery. Finally, an opinion requires a lot more effort. Representations often have to be made, and an opinion usually requires a fairly serious commitment of resources. Often an opinion is lengthy, but it is not valuable when it is very difficult to read or contains broad caveats. That's why it is important for our people to believe in the analysis, and they can get a lot of that belief just from guidance or advice as they develop conclusions.

Nick Pantaleo: Peter, is it always clear to you what you are selling or delivering? Are there at times expectation gaps between what you are trying to sell and what someone is trying to buy?

Peter Corcoran: Yes, an expectation gap often exists. Stated another way, at times the client doesn't actually know what it needs. There is a process required to get an understanding of what the real need is. Typically, a client will have some issue, challenge, or problem that it is trying to resolve. If it was easy to figure out a solution, the client would do so itself. So the client is looking for something that many times it can't come up with on its own. Part of closing that gap is trying to ascertain what the real issue actually is.

This may sound simplistic, but someone taught me very early in my career—a number of people will remember Gord Williamson, who was one of my mentors back in my early days—that you need to ask "why" in some way, shape, or form five times whenever you are presented with an issue. To this day I use that method and it really does help me to drill down to what the core issue is. Sometimes, someone will call us up simply to rent some arms and legs from us. That's what the client thinks it wants. You start to understand why it actually has to rent some arms and legs, and that the client's real need is entirely different. There is usually some core underlying issue, and the client is actually addressing a symptom and not necessarily the root cause of the issue. From my perspective, in terms of trying to deal with and deliver value to a client, it is spending the time to actually get to understand the root cause that allows you to bring value. That ties into my earlier comments about understanding the business, because you need to marry those two elements together and understand what might be driving the issue. I call it "getting to value"—what we perceive as the value of the service that we are delivering and what the client perceives as the value of the service that it is receiving. When an expectation gap emerges, we need to spend more time on understanding the issues.

Nick Pantaleo: In your experience, is there more of a gap when you deal with smaller companies—in particular, with those that don't have a large or experienced tax group?

Peter Corcoran: Yes, but in many ways I find dealing with a smaller company easier. People in smaller companies seem to be more pragmatic and less rigid about how to address issues. They are more open to concepts because they usually have a lot to take on with very limited resources.

The core and the fundamentals are no different when one serves a large company or a small company. It really comes down to understanding what the fundamental needs are and what the capabilities are in the organization to absorb change or whatever it is that they might be trying to address.

Nick Pantaleo: David, what are the hallmarks of great service providers?

David Allgood: It comes down to one attribute, and that has been true throughout my tax practice and legal practice in-house. Responsiveness is, in my view, the primary hallmark that distinguishes practitioners. There are a lot of very smart people out there, but it's accessibility to the adviser on very short notice that is the hallmark of great service.

Accessibility and responsiveness are key characteristics, in addition to creativity, leadership, and innovation. They are all important elements of the relationship, but from my perspective the most important is being able to get experts when you want them.

Another important hallmark, obviously, is judgment, but I think that is built into the service providers that you have on your roster.

Nick Pantaleo: Peter, do you have anything to add to that list—maybe even looking at it from the other side and describing what makes a great client?

Peter Corcoran: The matters that David addressed ultimately lead to the most important thing—trust. Clients must trust you. Clients need to know that when they call you up, regardless of what the question is, you can be responsive and do all of the things that David talked about. They have to know that you're going to treat them fairly and that you are going to be able to deliver. When I look at it the other way around, it is not just clients that choose to work with us; we choose what clients we want to work with, and I certainly have the same standard.

Trust is a two-way street. You find great relationships when that trust exists in both directions. There is a great deal of trust as an adviser. By that I mean that the client will be open and honest and that all of the facts will be on the table. Sometimes people want to spoon-feed you bits and pieces because they want you to get an answer or provide a solution for them. But I think that trust is the reason that a client will come back to you over and over. "Trust" is easy to say, but it is hard to earn. As you build a relationship with someone, trust encompasses all of the things you do that ultimately lead a client to be able to trust you, and that's why clients will come back. Over time you'll build goodwill. No one is infallible, and every once in a while you will have a hiccup; when you have built that trust and that goodwill with a client, it will see you through the good times and the bad times. It works both ways, and you need to understand what drives people internally in that organization and what's important to the person that you're delivering services to. I really would say that it ultimately comes down to one word, "trust."

Nick Pantaleo: Have you ever fired a client?

Peter Corcoran: Yes.

David Allgood: Yes. The decision would be based on two things; first, unfair treatment from an economic point of view, and, second, inappropriate treatment of our people. But that's a rare occurrence, and those instances have been exceptions to the rule. For the most part, I find that the people that we deal with and the clients that we have and the people in the tax community are good people, and it's really a matter of just trying to find out how best to try to help them.

Nick Pantaleo: In the current environment, if firms are seen as too conservative in the types of advice or opinions they are providing and clients want them to be more aggressive, for a lack of a better term, does that create more tension in the relationship? Do you see that as something that could happen more and more in the future? It could happen in the reverse as well.

David Allgood: Yes, we see it today. Even in the prior environment we saw it at times. I think you will find that there will always be cowboys out there, but they are few and far between. It's probably the companies that are much more conservative, given the risk environments and the governance models they're now adopting, and advisers are having to actually adapt to that rather than the opposite. I don't see a lot of cowboys running off and taking a risk or playing the lottery. People really want to have something that has been well thought through. They want to be comfortable knowing that if an arrangement sees the light of day they will not have to be concerned about reading about it on the front page of the *Globe and Mail*.

Michael O'Connor: I agree with all of that. Accuracy is important, and one element of that is ensuring that all of the collateral effects are considered. Nasty collateral effects often emerge in the most promising of plans. It happens because facts are missed or not enough time is spent on the matter. I agree with Peter's comment on trust. That's a big element.

Nick Pantaleo: To follow up on this theme, David, how have you ended up with service providers that you have used, and why are you sticking with them? And how have you gone about changing relationships when you felt you had to?

David Allgood: We go through a variety of processes. About 10 years ago we made a major convergence effort in which we shrank the number of professional service firms—legal firms, principally—that we use. We went through a very elaborate request-for-proposal (RFP) process, and we continue to maintain panels of firms. The situation is somewhat similar in the tax group. It has a series of firms that it uses in particular circumstances, and we run through a regular review process with respect to our service providers.

We have an assessment process that validates what we view as the quality of service that is provided. And we have fired professional service providers for excessive billing, an inability to have a risk-based discussion, a lack of responsiveness, and all of those things that were mentioned earlier as being the attributes that really characterize the best service providers.

It is remarkable that other service providers out there don't understand those drivers and parameters, and we are in positions to change them. At the risk of repeating what Peter said, it comes down to a trusted relationship. That is ultimately what we are looking for in both the tax and legal areas: having a relationship with the service provider that is trusted. They understand us. All of the business points that Peter mentioned are available to us, and while those are maintained we maintain the relationship. We have had circumstances where the relationship has changed for some unknown reason. Often it has been a result of a change of the lead partner or the relationship partner that ended a relationship. I think that that is an important element to keep in mind. In one particular case, when the lead service provider changed, the relationship deteriorated. So that goes to all of those things that were mentioned. The continuity of the relationship is based on maintaining the trust and the responsiveness on which it was built in the first place.

Nick Pantaleo: Michael, do you have any suggestions about choosing a tax lawyer versus a tax accountant for a particular assignment? What goes through your mind when you make that decision?

Michael O'Connor: My thinking has evolved on this point. When I first took on an internal tax role over a decade ago at Alcan, I used to think that whenever I had the chance I would continue to work with the external people that I already knew. I thought that that was a great way to proceed, since I already knew people's capabilities. But as we started to do merger and acquisition transactions or embarked on due diligence efforts, I realized how big the organization was and that it was very difficult to control everything. I became very much a fan of working as follows: If there was a law firm doing all the corporate work, then I would get to know that firm's tax people. I was always very surprised, pleasantly surprised, at how effective they were. And although all of the firms have great people, it's a matter of finding the great people among great people.

As between law firms and accounting firms, accountants provide a different perspective. The law firms are not as deep, it strikes me, in terms of tax people. They don't have people who can be deployed if you need arms and legs on a large scale. But on significant transactions, I tend to have an accounting firm and a law firm working side by side. They all work quite well together, and each knows what the other is expected to deliver.

Nick Pantaleo: David, for the younger practitioners or those who are simply young at heart, how do they get that first assignment from you?

David Allgood: Service providers sometimes come in and boldly ask, "I know you've got such and such a level of spending; how do I get a particular share of that?" That's approaching the question from the wrong position, from my perspective.

We are looking for people who come in and try to add value to the organization. If they are aware of a particular issue in our industry or if a particular issue has been reported in the newspaper, they come forward with a value proposition that is interesting. If they can get in the door with a value proposition, then work usually follows.

Nick Pantaleo: Peter, what works for you?

Peter Corcoran: As David suggests, it's a matter of trying to establish a relationship. I always say, "Hit a single." You've got to bring something relevant. Don't show up and just say, "Hey, I've got this idea, does it fit?" Invest the time necessary to understand the company's issues and how that idea fits the company's needs.

The other key element is to undercommit and overdeliver. We see far too much of "we're going to do this, this, and this," and then the advisers don't deliver at the level they stated that they would. That just leaves a bad taste.

But it is not easy to establish new relationships. I know that in our shop we talk about trying to go out and build new relationships, but that's a lot easier said than done. It is hard work, but as I said, I just try to start with something small. That's how you begin the journey to a trusted relationship. You can't just show up and have it on day one; it obviously helps to be able to reference other situations where you performed. And if you know somebody, it is always nice to have them put in a good word, but that is not always the case. It's not overly complex, but you have got to invest the time, take something relevant, and then do an outstanding job at it.

Something that I meant to mention earlier is that when you are delivering services, be very conscious of how you are absorbing your client's resources. We always talk about cost. Cost isn't just what the client pays you. Cost is the level of resources that the client needs to deploy in helping you through whatever plan you are developing and implementing. That's another important element that again involves being aware of the client's particular situation. As I said, to me it's just "Hit a single."

Nick Pantaleo: Michael, Peter mentioned earlier the importance of sellers knowing the industry and the business. To what extent should a buyer help the seller understand its business and its strategy? Do you sit back and wait for those questions to come at you?

Michael O'Connor: An understanding of the business, I think, is part of the facts. People will come in thinking that the facts are the tax return, or that they will glean something from seeing our organization chart. And I think, "Well, that's not the first thing that I would pull out when I am thinking about a situation or a tax-planning idea." I may be more likely to call for the general ledger accounts or broader elements of our fact base.

It is equally important that you know the advisers. If they have ideas, they should present them so that they can be digested quickly, and then we can figure out a way forward. It is useful to hear the ideas because they might come up at some point. We hear lots of ideas, and we will ordinarily work with the person who brings the idea—unless several come at the same time, which also happens.

In terms of getting that first opportunity, that first file, I usually explain that in order to do work for us you have to have completed an assignment, so I thought Peter's comment about hitting a single was particularly appropriate because small things will lead to larger exercises in the future.

Nick Pantaleo: Does hitting a single including bringing half-baked ideas?

Michael O'Connor: Half-baked ideas are tough, but I still like to hear them because sometimes they can be mixed and matched to achieve something that works. There are many collateral effects that spoil even fully baked ideas; the half-baked ones are especially tough to move forward to consideration, let alone implementation. How much should we do to help prospective advisers understand our business? We share enough about our strategies in publicly available data. From a business perspective, the information is out there—how our business has evolved. We are a public company, and our strategies are a matter of public record.

Nick Pantaleo: We've mentioned the increasing role that procurement plays on the buying side, particularly in large corporations. David, how would you assess the current role of procurement, and how has it helped you over the years?

David Allgood: Procurement is now fulfilling a much broader role than it ever did in the past. When I first took the general counsel job about 10 years ago, the organization had an outside service provider that was trying to improve our procurement generally. I remember sitting down with some young MBAs who were trying to tell me that I should procure legal and tax services in particular ways, and I thought that it was kind of odd to think that some young MBA could tell me how to retain professional services, whether legal or tax. I thought then, fresh out of private practice, it was a bit of an art, and that was the way in which you had to retain counsel.

Since then, the procurement of legal services and tax services has changed quite dramatically. In the last two or three years we have been actively engaged with our procurement team. The procurement teams are much more sophisticated than they used to be; they actually understand professional services. We have a team at the bank that understand the legal profession, accounting, and other consultants, and they're engaged in the procurement and assessment of those services, usually through the RFP process.

One of the techniques that we use in the legal side of the business is RFPs on projects where the spending is more than an estimated $75,000. RFPs are not put out to just any firm; we apply our judgment about which one we will select. But procurement plays a very key role in providing us with a framework for organizing the inputs and then assessing the outputs. On some of our bigger matters, we would not retain counsel without going through that process with the help of procurement.

Peter Corcoran: To pick up on what David said, in the last three to five years we have seen procurement far more than we did previously—more so in big companies, less so in private companies. But I would say that even the smaller private companies are becoming more sophisticated buyers.

On large proposals, I found it very difficult to deal with tax directors who weren't necessarily experts at buying. What I found with procurement was that even though it is sometimes frustrating to have to respond in a very structured manner, the process ensures that everybody knows it's an apples-to-apples exercise. Without the rigour of the procurement process, it often wasn't clear. You know that one firm is bidding on something. You know that procurement is very good at making sure that everyone is bidding in exactly the same way. And procurement also does a good job of separating the value drivers, the mundane arms and legs, and so they will price that very differently. If you are comfortable in your ability to deliver on the value elements, as a seller that's a positive. So they do bring a lot of structure, which is good.

The downside of procurement is that it is difficult for them to measure trust and competence. They are getting better at measuring trust, just by virtue of interviewing other companies that have used those advisers. But it is not as easy for them to actually measure competence.

Absorption of internal resources is another thing that they don't necessarily measure effectively, because knowing an organization and knowing how to get around in it is a huge advantage to providers. Many times when someone changes over, they underestimate significantly the impact that it has on their own organization. From somebody understanding the enterprise resource planning (ERP) systems you have companies out there running 20 or 30 platforms, and if part of the exercise involves being able to access this information from a system, that's a huge learning curve and a burden that more often than not will fall on the internal party.

But I do think that, on balance, procurement has made the selling of tax services a better experience, even though it is frustrating if you believe that you can differentiate on value and your ability to deliver.

Michael O'Connor: When I was in private practice, I used to think that we didn't need people who could sell, we needed clients who could buy. Then I moved to Alcan and I realized that when I encountered people who could sell I would introduce them to our procurement people just to mess with them. I have matured since then.

Our group works very closely with procurement now, and our thresholds may be different from David's. Yes, there are things that will have to go out to RFP if they are over a certain threshold, and I find that the procurement people bring a lot to the table in those situations and that they challenge some of our thinking. We've also tried to do master services agreements with different firms, and we get all that engagement stuff out of the way so that we can focus on the work required.

Nick Pantaleo: An issue that has been around for a few years is the role of Sarbanes-Oxley. Initially it had a significant impact in curtailing the use of external auditors for tax services, at least for many public companies. David, how has that landscape changed over the last 10 years? In your experience, are there advantages to using external auditors for permitted tax services?

David Allgood: Probably not. Risk has become much more of a focus across all industries. In the financial services industry, we have had chief risk officers for years, but risk has become much more pervasive in all aspects of the business. Using auditors to provide you with even "permitted" tax services has risks associated with it, because you have to make sure that you stay within the scope of what permitted tax services are. We have an audit chair who is risk-averse and who thinks a nice bright line is what really works, so we do not have our auditors providing permitted tax services. They do what I would call some very commoditized work in some of our T4 and T5 areas, but that decision is largely driven by the board's risk appetite. I think that the risk appetite of many boards is becoming much smaller.

Nick Pantaleo: Michael, what is your perspective on this issue?

Michael O'Connor: This area has evolved over the last 10 years, and I take a bit of a different view. I think that carving the auditors out limits your choice of service providers, and I believe that the problems that existed in the 1990s with Enron and Arthur Andersen, and that whole debacle, arose largely because the controls were not in place to support the use of the external auditors.

Today there is much more transparency and much more discussion with audit committees about certain services. Many tax services are not prohibited services; in fact, tax services in general are not prohibited services.

I think that there is a role for the external auditors to play, given their deep understanding of our facts, and to propose on work that is tax-related. Many tax departments are making management decisions themselves about different things, and a lot of work and many controls are involved in those decisions. I am a big proponent of using external auditors when it makes economic or commercial sense, is not otherwise prohibited, and does not threaten independence.

I had this very discussion in my previous role with the chair of the Alcan audit committee. We had a fairly open policy, but we never used the auditors for tax work as a practical matter, which was not a good idea for a lot of foreign work that needed to be done, and the people who in many cases knew us best were the auditors. So I have become a bit of a proponent of not excluding the external auditors from tax services. As an ex-auditor, I know how tough it is out there, but auditors also really know the facts from their audit work. If they don't know the facts almost as well as us, then that's a challenge.

Nick Pantaleo: Peter, do you want to make a pitch?

Peter Corcoran: You probably can guess that I am closer to Michael's view and I believe what he says. I understand that at the end of the day boards are going to set, and management within an organization is going to accept, whatever their risk tolerance is for using an auditor on non-attest services. But many times the auditor is actually in a better position than other outside parties by virtue of its vantage point. Michael touched on this. From an efficiency point of view, many times it's more efficient for the auditor to undertake certain work, and that just drives lower costs.

The marketplace has probably swung fairly aggressively in restricting attest services. I agree with David: for certain services you want to make sure that you don't cross the line—obviously, non-permitted services are just off the table—but there are probably some other areas that people need to think about. In the end, it depends on the organization itself.

Nick Pantaleo: Contingency fees are now one of the hallmarks of aggressive tax planning in the context of section 237. What are your comments about that, what have your experiences been, and what are your attitudes toward contingency fees?

Michael O'Connor: I don't like them. I often tell people to just work slowly. Contingency fees work, and they can work well, in terms of capping fees, etc.

if people are willing to work on a capped basis. But it is difficult because with respect to most of the ideas that have come to us on a contingency basis, we later learn of some collateral effect that really hurts. We don't enter into many contingency fee arrangements. That's not to say that they're not used or that they are not useful in terms of managing spending, etc.

Nick Pantaleo: David, what are your comments on contingency fees or alternative billing arrangements?

David Allgood: I agree with Michael in the tax-planning area, but tax litigation is part of the tax spectrum. In litigation generally we look at various forms of contingency fees or alternative fees, caps and collars, whatever you want to call them. You can have success-driven fees in the tax context, particularly of objections and appeals, and I would keep that in mind and in your arsenal, depending on your circumstances.

Peter Corcoran: We talked about procurement earlier, and I can tell you that when dealing with procurement groups, being creative in your pricing and being able to use things like contingency fees and other layered pricing arrangements is effective in helping clients manage their financial costs, so I think that there is a place for them. Obviously they are not permitted services in attest clients, but I find that they can help you bridge the gap in perceived value that exists sometimes between one party and the other. I see more and more of it. We structure mergers and acquisitions work this way, and I find that quite often now we have to be creative in how we price the work.

Nick Pantaleo: Michael, how important is having privilege on opinions?

Michael O'Connor: As an accountant who does not have privilege, historically I have questioned the value of it. More and more, however, I think that it is important; if you are in a situation that is possibly going to be litigated, then it is vital. But again, if you have an open relationship with the CRA, you shouldn't be in a situation where you are picking apart what is privileged and what's not privileged. I don't think I have ever had a situation where I had to fight a claim for privilege on anything.

David Allgood: I think that privilege is always important. You can decide that you are going to waive it when you're in a dispute with the revenue authorities, but if you have the opportunity to establish a privileged relationship or privileged communications with your clients, you should do so. You can't get it back if you haven't set it up in the right way, but you can always waive it. So it is always worthwhile trying to get it.

A note to tax practitioners: It is important to think about the in-house legal group in the organization. You may be dealing with and focused on the in-house tax group, but in the context of developing privileged relationships or privileged retainers, you should be aware that you may have to deal with the in-house legal group (if your client has one) in order to make that work.

Nick Pantaleo: Peter, you mentioned that companies see the link between spending in a variety of areas, including tax, and governance over risk. Do you want to add a little more to that point?

Peter Corcoran: It is not an exaggeration to say that probably three to four times a week we meet with companies to talk about risk and risk frameworks and how they build them out in the context of their business.

One thing that we do frequently right now is take a look at disaggregating everything that a tax function does and then mapping that against the likelihood of the risk that a problem can occur and what the likely quantum of that risk is. We build heat maps of those occurrences and then we take a look at the spending and the costs that organizations incur internally for their tax function and all those disaggregated elements of tax and what they have as external spending. The one observation that you hear—at least in our experience—is that the majority of companies allocate a disproportionate amount of their resources to manage the lowest-risk, lowest-likelihood items in the organization. That is understandable, because there is an enormous amount of statutory reporting, both in financial statements and in tax returns.

That said, our analysis has enabled us to work with people to realign the elements and help them understand the risks that the organization really cares about. I always point out to people that 95 percent of tax risk is not created by the tax function. It is created in the organization, and the tax function is just charged with catching it and trying to manage and mitigate it. I know that it is going to be a continuing trend because of the pressures out there. People are looking to how they can actually take on this world with scarce resources. That's part of what is going on out there right now.

Nick Pantaleo: As we look ahead 5 or 10 years, how do you see the environment changing, and how will it affect the buy-and-sell decision?

Peter Corcoran: I suspect that in the future, people in tax functions won't be doing much of what they're doing today. Much of the tax function will be taken over by technology. Right now we are seeing a trend as more and more organizations start to build legal entity financials into their ERP system, because what typically happens is that people manage the business along management lines: they haven't developed the ability to drive out all of the financials from a tax-filing point of view. Therefore, they haven't had a good tax data warehouse. In addition, they didn't have very good tax provision programs. Oracle has its Hyperion tax provision and SAP is coming out with one, and a number of third parties have developed similar offerings. All of the tax data required in an organization will be in a data warehouse.

There will still be a need for tax people, but they will function in a very different way. You will be helping to create the algorithms that a programmer writes and puts in place. In our organization in North America we have 350 tax-trained people who do nothing but technology. And it isn't that tax won't be out there; it will just be done differently. Many of the more mundane matters that we have had to deal with over the years—in particular, within the tax functions of organizations—will be automated away, and it will change dramatically what we are doing.

Nick Pantaleo: David, any closing comments?

David Allgood: I agree entirely with the technology point. Also (and the topics are probably not unrelated), I see the use of alternative fees. You are going to see more of these structured fee arrangements, whether they are fixed fees or, as I said, caps and collars. With respect to alternative service providers, I think that the process of disaggregation will bring out another set of service providers that will be doing some element of the whole process. The tax accountant and the tax lawyer will be doing a smaller and perhaps a more expertise-driven part of the thinking, but other service providers will provide other elements of it.

Nick Pantaleo: Michael, the last word goes to you.

Michael O'Connor: I think that the alternative fee arrangements will change the most. It is critical to come up with a different way of pricing, because when you buy services on an hourly basis the question is how many hours should it take. That becomes a very antiquated way of charging.

I do hear Peter's point about whether the tax functions will disappear. Payroll departments have been outsourced. The firms currently have had spotty records in terms of outsourcing tax functions, but I think that if the firms are serious, someone will come around to disaggregate us (or vice versa) by finding a better way to marry up the facts, the skill, and the time. That is the challenge of the future. I think whoever cracks that code of merging facts, skill, and time will be the big winner.

BIBLIOGRAPHY INFORMATION
David Allgood, Peter Corcoran, Michael O'Connor, and Nick Pantaleo, "Buying and Selling Professional Services," *Report of the Proceedings of the Sixty-Fifth Tax Conference*, 2013 Conference Report (Toronto: Canadian Tax Foundation, 2014), 29:1-18.