

# Thriving in Business in 2018: Simply, The Art of War

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**T**he *Art of War*, written by Chinese general Sun Tzu more than 2,500 years ago, has long been heralded for its advice on military success. As I review the events of the first two quarters in 2018, I think it's appropriate to consider the top five lessons from *The Art of War* as they apply to modern issues facing the transportation industry.

## 1. Warning: Don't attack someone just because they made you mad.

### *Surviving the Potential demise of NAFTA: Cross-Border Issues*

The first concern I wish to highlight is the conflict pertaining to cross-border trade and NAFTA by Canada and the US. An indirect result of this conflict on drivers may be that entry information being collected at land border-crossings is being shared so that one country's entry data is used as a record of exit from the other country.<sup>2</sup> If US authorities use the collected data to argue that Canadian drivers are spending more than 120 days annually in the US, their worldwide income may be subjected to US taxation.

As well, anyone spending over 180 days in the US in any 12-month period could face sanctions for being unlawfully present.<sup>3</sup> Cabotage rules may also be impacted by ceasing to apply or by being applied differently, potentially leading to immigration issues for drivers moving goods within the US.

"Thickening of the border" is another concern that slows down safe and secure trade due to new screening procedures at the border.<sup>4</sup> US Customs and Border Protection (USCBP) has revoked Fast and Secure Trade (FAST) memberships of some Canadian truck drivers that had a connection to one of the seven entry ban countries; although previously vetted for entry into FAST. The prohibition preventing these drivers from using FAST lanes at the border caused longer wait times and lengthened the time required for FAST trucks to cross due to the infrastructure at the border, creating a bottleneck at the divergence point.<sup>5</sup>

With the hope of reducing the effects of new border measures, companies can sign up for Partners in Protection and Electronic Data Interchange. Drivers can apply for the NEXUS program and should know their load in order to facilitate quicker inspections and response times to any USCBP questions.<sup>6</sup>



## 2. Management: Care about your team, but also be tough. Changes to Employment Laws

There were many recent changes in Ontario employment laws and the one that has the potential to most affect transportation is the change to employee misclassification.<sup>7</sup>

Under the new amendments to the *Employment Standards Act*, businesses are prohibited from misclassifying employees as independent contractors, and an independent contractor may be assumed to be an employee.<sup>8</sup> Where problems arise and an investigation occurs, an adjudicator looks at the relationship as a whole to determine if the individual is a contractor or employee. Following that, the onus is now on the business to prove that the worker is a contractor and not an employee.<sup>9</sup>

Many factors are considered when determining if an individual is an employee or a contractor. An employee cannot subcontract work to others, pay is not affected by an employee's work performance, the business has the right to suspend/dismiss/discipline employees, and also provides employees with the tools/equipment to perform their work.<sup>10</sup>

Alternately, an independent contractor owns and is often responsible for the tools/equipment used to perform the job, is in business for themselves, has a risk of financial loss, can subcontract work, and is not subject to disciplinary measures.<sup>11</sup>



**Implications for businesses**

If a business misclassifies an owner-operator as a non-employee there are significant repercussions including prosecution, public disclosure of a conviction and monetary penalties. If a business has failed to deduct the required contributions they may be liable for paying both their own and the employee's share of contributions and premiums owing.

In addition to these penalties and interest, if a worker is designated as an employee they can lay claim to their rights under the *ESA* and common law.<sup>12</sup>

**3. Tactics: Plan ahead.**

**Cannabis and Employment**

By October 2018, cannabis will be legal in Canada and available for recreational consumption. Many businesses are concerned about these changes and re-evaluating their drug/alcohol testing policies. The cost of illness related to drug and alcohol use for Canadian employers has been estimated to be more than \$39.8billion. According to Health Canada, the rate of registered medical marijuana users is increasing and reached 201,398 users as of June 2017.<sup>13</sup>

If businesses seek to mitigate costs through restrictive drug and alcohol testing, it must be noted that addiction is classified as a disability under the Ontario *Human Rights Code*, making it a protected ground. Testing requires a balance between workplace safety requirements and employee human and privacy rights and can only be performed under certain circumstances.<sup>14</sup>

When an employee raises the issue of disability, an employer has the duty to accommodate up until the point of undue hardship.<sup>15</sup> "Undue hardship" means the cost to accommodate an individual must be high enough as to significantly interfere with the employer's business.<sup>16</sup>

**Cross-Border Concerns**

Both Canada and the US have rules preventing criminals from entering their countries. The American *Immigration and Nationality Act* states a person attempting to enter the US is inadmissible if they have violated "any law or regulation of a State, the US, or a foreign country relating to a controlled substance;" and marijuana is a controlled substance.<sup>17</sup>

Where a Canadian admits to the essential elements of an American crime, it will be considered a "conviction" for US immigration purposes. It is irrelevant if the conduct is legal in Canada; a conviction for a crime related to drug use in Canada is not required for a Canadian citizen to be found inadmissible.

Employers are advised to be proactive in informing employees who cross the border of what can occur should they admit to consuming marijuana. If a key component of an employee's position requires cross-border travel, the point of undue hardship may be reached if the employee cannot enter the US as a result of legally

possessing/sharing marijuana. Moving forward, employers can clarify their policies, enabling employees to understand that the change in Canada's legal regime surrounding marijuana may impact their ability to perform the duties of their job.

**4. Management: Hire great people - weak, frustrated subordinates will cripple you.**

**Federal Employee Firing and Termination**

Federally regulated employers fall under different standards than provincially regulated employers. Recently, Canada's Supreme Court essentially ruled the *Canada Labour Code* prevents termination of non-managerial employees with more than 12-months of service without reason.<sup>18</sup> The Court ruled termination pay in lieu of notice isn't the appropriate way to terminate the employee-employer relationship. Thus, non-fixed term employees can literally be awarded a job for life unless termination with cause can be proved.

The test for proving just cause is difficult to meet. The employer must prove that the act/omission of the employee was so significant it repudiated the employment contract and disrupted the employment relationship to the point where it could no longer continue.<sup>19</sup> Factors satisfying just cause are serious misconduct, habitual neglect of duty, incompetence and conduct incompatible with the employee's duties. Fortunately, there are ways an employer can avoid creating a job for life.

Employers should conduct performance reviews prior to the end of one-year or hire employees on a fixed term contract for one-year or less. If the employer has concern, they should terminate the employment contract prior to the end of one-year. Employers are also encouraged to set up a progressive disciplinary policy and carefully document the details of any breach.

**5. Tactics: Don't just do something – make sure it helps you. Canada to Require ELDs**

Last December, the Government of Canada published a proposal requiring the use of ELD technology.<sup>20</sup> ELD regulations will apply to federally regulated carriers and commercial drivers of trucks and buses. This proposal mandates the use of ELDs by drivers who currently maintain a daily paper log, establish specific requirements for "supporting documents" that must be kept by the driver/carrier, and incorporate by reference a technical standard to establish performance and design specifications for ELD devices.

The advantage to using ELDs is that it standardizes processes to prevent errors, logbook tampering and driver harassment. ELDs will adopt most of the provisions in the US mandate, and will require replacing paper logs with a regulation-compliant device that connects directly to the engine ECM. The implementation of ELDs will not change the Hours of Service regulations, just how drive time is recorded and reported. Transport Canada estimates the combined savings in benefits to have a total value of \$255.4 million, annualized at \$36.4 million.

The Canadian ELD compliance deadline is set for 2020 and the extended deadline for those already using ELDs will be in 2022. 

**Endnotes**

- <sup>1</sup> With thanks to Michelle Staples, Articling Student at Isaacs & Co.
- <sup>2</sup> New Border Measures Cause Worry for Canadian Truckers, Jim Bronskill, Toronto Star, June 25
- <sup>3</sup> Id.
- <sup>4</sup> Thickening of the Border, what is Canada's Concern?, Cyndee Todgham Cherniak, February 9, 2017, Canada-U.S. Blog: Legal developments affecting Canada-US Cross border trade
- <sup>5</sup> Id.
- <sup>6</sup> Id.
- <sup>7</sup> Employment Standards Act, 2000, S.O. 2000, c. 41
- <sup>8</sup> Id.
- <sup>9</sup> Id.
- <sup>10</sup> Id.
- <sup>11</sup> Id.
- <sup>12</sup> These rights include pregnancy and parental leave, statutory holidays, vacation, overtime, termination and severance pay.
- <sup>13</sup> Getting into the Weed on Immigration: How Legalized Marijuana Could Affect Employee Travel to the US, Carolyn Frost and Reis Pagtakhan. November 30, 2017, MLT Aikins. <<https://www.mltaikins.com/immigration/getting-into-the-weed-on-immigration-how-legalized-marijuana-could-affect-employee-travel-to-the-u-s/>>
- <sup>14</sup> More information on Drug and Alcohol Testing polices may be found in the OHRC Policy on Drug and Alcohol Testing 2016 <<http://ohrc.on.ca/en/policy-drug-and-alcohol-testing-2016>>
- <sup>15</sup> Human Rights Code, R.S.S. 1990, c. H. 19.
- <sup>16</sup> More on the duty to accommodate can be found on the Ontario Human Rights Commission website, <<http://ohrc.on.ca/en/learning/duty-accommodate>>
- <sup>17</sup> Id.
- <sup>18</sup> Canadian Labour Code, R.S.C., 1985, c. L-2.
- <sup>19</sup> Id.
- <sup>20</sup> Regulations Amending the Commercial Vehicle Drivers Hours of Service Regulations (Electronic Logging Devices and Other Amendments), Canada Gazette Part I, Vol. 151. No. 50 (Dec. 16, 2017)



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