IN THE MATTER OF A FORMALE ARBITRATION

BETWEEN: CANDU ENRERGY INC.

AND: THE SOCIETY OF PROFESSIONAL ENGINEERS AND ASSOCIATES

AND IN THE MATTER OF THE MANDATORY DAYS OFF / LEAVE PROGRAM

SOLE ARBITRATOR O.B. SHIME, Q.C.

APPEARANCES:

Michael Smyth	Counsel and others for the Corporation
Micheil Russell	Counsel and others for the Union

Hearings in these matters were held in Toronto on June 14, July 12 & July 14 and September 14, 2016.

AWARD

On August 29, 2014, Candu Energy Inc. ("Candu") wrote to members of the Society requesting a meeting "with the Union executives to provide some information about a new program coming to Candu this fall." The parties met on September 5, 2014 at 9:00 a.m. and Candu posted a notice concerning mandatory leave days at 9:30 a.m. That notice is as follows.

> "As you know, there have been recent announcements about potential new build projects in Romania and Argentina. Unfortunately, Candu does not yet have a contract for either of those opportunities and currently, Candu does not have as much committed or strongly anticipated work between now and December 31 as we had hoped to. This week's layoffs were in response to this situation, but unfortunately they are not enough to address the difficult reality we currently face.
>
> To more closely assign our labour resources with our business demand, 12.5 mandatory leave days are being introduced in addition to the 115 shutdown days previously scheduled between Christmas and New Year's Day. This measure helps to mitigate the need for additional layoffs at this time.
>
> Candu offices will be closed as follows:
>
> Friday, October 10
> Friday, November 21
> Monday, December 15 to Thursday, January 1, inclusive.
>
> This includes December 24 (half day) and December 31, as previously communicated .
>
> In addition, all employees will also be required to take 3 mandatory leave days as indicated in the table below based on the last digit of your employee number.

The mandatory leave days are:

Group A	Group B
Employee numbers ending in even number	Employee numbers ending in odd number
Friday, October 17	Friday, October 24
Friday, October 31	Friday, November 7
Friday, November 14	Friday, November 28

Employees must use vacation, personal business days, and *existing* banked time before taking leave without pay. **There will be no option to bank time to specifically make up the time for the leave days,** with the exception of Collective Agreement references to the 1.5 Christmas shutdown days (PSAC Article 13.02 / SPEA-TT Article 18.04 / SPEA-SE Article 19/04).

Employees who do not have sufficient vacation, personal business days, or existing banked time will be allowed to borrow up to 7.5 days from their 2015 vacation entitlement.

Please note that only employees who are on medically-supported sick leave prior to these shutdown dates will be allowed to take any of the shutdown days as sick time.

Alternative arrangements for limited critical business activities will be approved on an "as required basis" and will required approval from your SVP and the Director of Human Resources.

A revised 2014 company calendar reflects these changes."

The Society asserted that at the 9:00 a.m. meeting there was no discussion about the mandatory days off and "just a heads-up". Accordingly, on September 9, 2014, the Society filed a grievance which claimed that the imposition of mandatory days off / mandatory leave days between the date of the grievance and the end of 2014

breaches {the} collective agreements. The Society requested that Candu rescind its mandatory days off program and if it did not the Society claimed full compensation and full redress for all losses incurred by the bargaining unit members. Candu denied the grievance on the basis that It had acted within its Management Rights in implementing the Mandatory Shutdown Days. Candu proceeded to invoke the Mandatory Leave Days.

There is very little dispute about the underlying facts leading to this grievance. In 2013 Candu was advised by the CEO of Bruce Power that it intended to refurbish all six of its reactor units and Candu was the preferred vendor. As a result of those representations, Candu included the work for Bruce Power in its 2014 budget. That budget was on a calendar year basis. Some work arrived in January of 2014 but not as much as Candu expected. Bruce Power advised that they expected the project to proceed in mid-year; however, in August 2014 Bruce Power advised Candu that it did not expect to proceed until sometime towards the end of the first quarter of 2015 resulting in a four to six month delay. That delay affected a range of disciplines within the entire Candu organization.

As a result of the delay, a manpower problem was created at Candu resulting in a surplus of 100 to 120 employees for the fourth quarter of 2014. Candu not only wished to avoid permanent layoffs but also wanted to maintain the availability of the staff to perform the work when it was scheduled in 2015. There was a tight timeline of approximately two weeks to develop a response to the Bruce Power delay and Candu, based on a directive from its President to address the problem created by the excess labour for the period September to December 2014 and also to avoid

permanent layoffs, introduced the Mandatory Days Off (MDO) program in September 2014.

There had been some discussions about work force issues between the parties in the Spring and Summer of 2014 in which proposals were made by the Society which included a no lay-off guarantee, but Candu rejected the Society's proposals because of the extreme difficulty in managing them given its client commitments. These discussions and their aborted conclusion preceeded the August 2014 advice by Bruce Power that the project would be delayed until 2015.

At the meeting of September 5, 2014, the Company advised the that the Bruce Power project would be delayed by four to six months resulting in a significant excess of manpower and there were between 110 and 120 employees whose skills were related to refurbishment for whom the Company did not expect to have work until the first quarter of 2015. Accordingly, the Company had to bring down overhead costs by fifteen percent in the fourth quarter of 2014 resulting from idle time caused by the Bruce Power delay. Shortly after the meeting the Company announced the MDO program to the employees.

There was a second meeting on September 26, 2014, with executive members of the Society who had not attended the earlier meeting in September. When Mr. Ivanko, a Society representative, asked why Candu had introduced the program without negotiating it with the Society, Mr. M. Ross, Vice-President of Candu, informed him that Candu had recently received news from Bruce Power which indicated they would need about sixty (60) fewer employees in the fourth quarter than Candu had projected and

the news had come so suddenly that the Company had to act quickly. Candu decided that the MDO program met the needs of the Company with a minimum impact on employees.

The 12.5 days off were determined by Candu. All the days were with pay in the fourth quarter of 2014 and were on Fridays, so that employees would have long weekends. There were additional days added to the usual Christmas shutdown from December 24 p.m. until December 31 a.m.. The Employees were required to use vacation time, banked time, and personal days before they could take a day without pay. Employees were divided into two groups for three of the 12.5 days so that one group took three days off permitting one-half of the staff to remain at work on those days, while the other group took a different three days thereby allowing the first group to remain at work on those days. Some employees were required to work on MDO days but they were required to take other days off. There were also exceptions to taking MDO days based on client needs. The MDO program removed the equivalent of 110 full time positions for three months and avoided what might have been a significant lay-off in excess of seventy-five (75) employees. It is important to note, as the testimony indicated, that Candu was concerned that if there was to be a layoff some of those employees, whom it required for the Bruce Power program and other projects, might seek employment elsewhere resulting in a loss of those skilled employees for Candu.

Argument

The Society submitted that Candu, by imposing the MDO Program, was in violation of a number of provisions of the collective agreement. First, the Union claims that by implementing the MDO Program the employees were paid less than the salary prescribed in Article 20 of the collective agreement. Second, by implementing the MDO Program, Candu unilaterally altered the normal work week in violation of Article 19 of the collective agreement and there were not exceptional circumstances permitting the Company to alter the work week. Third, the requirement to utilize vacation days, personal leave days and banked time contravened Articles 14.05, 14.17 and 21.10 of the collective agreement which contain vested benefits enabling the employees to choose the scheduling of these benefits, subject to management approval based on operational requirements, and the MDO Program abrogated the right of employees to utilize those benefits in the manner contemplated by the collective agreement. Fourth, Candu was in breach of Article 3 of the collective agreement by introducing new policies and procedures affecting working conditions without consulting with the Union. Fifth, in the event that Candu did not violate the above-referenced Articles of the Collective Agreement, its actions constituted a layoff pursuant to the Collective Agreement and the Company did not follow the required layoff procedures.

Candu, in its submissions, acknowledged that all employees (union and non-union) were required to take 12.5 days off work with pay, referred to as "mandatory leave days". Candu claimed that there were between 110 and 120 employees for whom the Company did not have work until late in the first quarter of 2015 and it estimated it had to bring costs down by fifteen percent (15%) in the fourth quarter of 2015. The offices were closed on October 10, November 21 and December 15 to 24 a.m.; December 24 p.m. to December 31 was the normal scheduled Christmas shutdown. In addition, one group of employees was required to take three mandatory leave days on October 17, 31 and November 14, while the other group was required to take three mandatory leave days on October 23, November 7 and 28. Employees were required to use vacation time, banked time, and personal days before they could take the days off without pay, and as well they had the option of borrowing from the next year's vacation. It was estimated that approximately six percent (6%) of the hours, including those for union and non-union employees, were without pay. Approximately, eighty-two percent (82%) of the required hours were taken prior to the end of December 2014.

Candu maintained that what occurred was a short term temporary shutdown/stoppage necessitated by a bona fide business need and that the Company had broad managerial rights to operate and "manage the enterprise" including staffing levels which are not curtailed by the collective agreement and the exercise of those right was reasonable and transparent.

Candu argued that arbitral decisions have recognized management's right to implement shutdowns or unilaterally schedule vacation or leave days without triggering a layoff or violating the scheduling provisions in a collective agreement. Deference is given to management to determine what is operationally feasible and in its business interests.

Also, Candu claimed the language of the collective agreement concerning vacations, personal business days and banked time does not specifically override the Company's management rights to schedule employees to use their specific entitlement. The entitlements scheduling is subject to operational requirements which, in this case, addresses the temporary overstaffing problem by maintaining staffing levels with the least disruption to the business and to the employees. The vast majority of the employees did not suffer any monetary loss when they used their entitlements to address their lost income for the leave days.

While employees may have been inconvenienced, the operational requirements for a short period dictated the use of these entitlements and the Company considered the program to be more fair and reasonable than a layoff. Further, by avoiding layoffs the Company hit or came close to its projected savings target and avoided layoffs for almost a year.

Candu asserted that the Company enacted the temporary program in good faith and for bona fide business reasons to deal with an operational shutdown and it was consistent with the general purpose of the collective agreement, which states that,

> "to enhance the morale productivity and effectiveness of professional employees in the performance of their duties to the end tht the clients and other shareholders of the Company shall be well and effectively served by an efficient and successful enterprise in the global, commercial and nuclear reactor market."

Candu maintained it was trying to avoid layoffs and enhance the morale and productivity of the work force and it acted in good faith to avoid disruption and ensured the effectiveness of operations while continuing to serve important projects. Candu also claimed there were no restrictions in the collective agreement limiting management rights to schedule time off/shutdowns.

Candu argued that the two concepts of employee preferences and operational requirements are not equally weighted given the specific language and the term operational requirements should, based on the language, be given dominant consideration. Candu asserted that the language of the collective agreement does not guarantee that employees will get their choice of time off and does not preclude the Company determining the vacation schedule. Candu claimed there is not language in the various clauses limiting the Company's structuring operations or the ability to shut down operations. Candu also relied on alleged relevant case law in support of its position. Candu also argued that with respect to both personal business days and banked time that the language of the collective agreement does not restrict management's rights to schedule those days as part of staffing and managing the enterprise, and that operational requirements are the dominant consideration.

Candu further submitted that the negotiated Christmas shutdown provision did not preclude other shutdowns where employees must take a vacation, and shutdowns are not synonymous with layoffs. An employer is able to reduce hours without triggering a layoff. Candu argued that the hours of work provision does not guarantee a right to hours each week, and the salary provision does not guarantee a right to receive pay. Further, Candu maintained it was not required to discuss the implementation of the MDO Program with the Society in advance of implementing it since the MDO Program was not a policy or procedure within the meaning of Article 3.02 requiring changes to existing policies and procedures. However,.Candu claimed even if the Company was in breach of Article 3.02, the appropriate remedy is not to declare the program void ab initio. Candu also submitted the employees did not suffer a loss and there is no basis to provide any monetary remedy

Analysis

(i) General Overview

There are two parts to Candu's MDO Program. The first part consists of the individual days off while the second part concerns the alleged pre-Christmas shutdown. Turning first to the individual days off, I find that notwithstanding the naming of those days as a part of the MDO Program, it is necessary to examine the substance of what occurred. Candu determined that there was not sufficient work available and for budgetary reasons determined that the offices would be closed on October 10th and November 21st and that the employees would be divided into two groups, with Group A taking mandatory leave days on October 17th , 31st and November 14th , while Group B was to take mandatory leave days on October 24th, November 7th and 28th.

There is a distinction between those days when the offices were closed and those days where one-half or a significant number of employees remained at work. October 10th and November 21st, when Candu closed its offices may properly be considered a shutdown and I will deal with those days and concept later in these reasons. However, the days when either one-half of the employees or a significant number of employees were at work was a classic layoff. In **Canada Safeway Ltd. v. RWDSU, Local 454** [1998] 1 SCR 1079, Cory J. at p. 1112 determined that a "layoff arises as a result of the employer's removing work from the employee". He further stated as follows:

> "Arbitrators have generally understood the term "layoff" as describing the situation where the services of an employees have been temporarily or indefinitely suspended owing to a lack of available work in the plant".

By selecting a significant number of employees to work on those days and singling out another group not to work thereby temporarily reducing their hours, Candu undermined the layoff provisions of the collective agreement and particularly the acquired seniority rights of some employees thereby altering the nature of their employment. Those temporary mandatory days off were in substance a layoff because many people continued at work while others had their hours reduced by being off on those days. Those days were a substantive layoff in Mandatory Days Off clothing; Candu cannot by nomenclature change the substance of its actions. The days where some employees worked and others were required to stay home where in violation of the layoff/seniority provisions of the collective agreement.

I note also that the parties have established a procedure to follow in the event of a layoff which ought to have been followed when Candu decided on its MDO Program. To that extent there was a violation of the relevant parts of Article 22 of the collective agreement

The days off on Friday, October 10th and Friday, November 21st were shut down as were the days of December 15th to December 23rd, adjacent to the Christmas shutdown; they were days when the offices were closed. Employers must have the ability to respond to various economic situations including lack of

available work. Layoff is a legitimate response to a business slowdown. So too is a shutdown. However, the response to reduced business activity must be done with reference to the terms of the collective agreement.

In this case, Article 3.01(c) of the collective agreement gives Candu the right to " ... schedule the work to be done", and "to determine staffing ...". I am in agreement with Candu's submissions that the specific reference to a Christmas shutdown does not impair its management right to shut down on other occasions as a legitimate business response to lessened economic activity or lack of available work. Nor does a complete shutdown impair the hours of work provision which does not constitute a guarantee of hours to be worked, but merely sets the boundaries that form a basis for overtime work. Thus, subject to the specific provisions of the collective agreement, which I will deal with later in these reasons, it may have been open for Candu to require some employees who had not yet taken their annual vacation in 2014 to take their annual vacation during the period of shutdown. Also, the evidence indicated that some employees may have worked during the shutdown and I shall remain seized should any difference or dispute arise between the parties resulting from work being performed during the shutdown.

Analysis

(ii) The Collective Agreement Language

What is different about this case is that Candu's MDO Program required the Employees to utilize their personal business days, banked days and vacation days to pay for their time off work under the Program. In effect, the employees paid for the mandated time off out of their entitlements. It is trife law to say that each case must depend on its own individual facts and the relevant language of the collective agreement. With that in mind, I now turn to consider the language of the collective agreement concerning, (i) personal business days; (ii) existing bank time and (iii) vacation days.

Personal Business Days

Article 14.17 "Personal Business Days provides as follows:

> "Effective January 1, 2012, Personal Business Days shall be administered on a calendar year basis and one (1) day of paid leave per calendar year shall be credited to employees for use in personal or special circumstances. The scheduling of leave shall be subject to the Company's operational requirements and the Company's agreement shall not be unreasonably withheld.
>
> During 2012, 2013, 2014, and until December 29, 2015, a no time shall an employee have a credit of more than then (10) Personal Business Days. On December 31, 2012, 2013 and 2014, unused leave to a maximum of nine (9) days shall be carried over to the next calendar year.

> As of December 30, 2015, art no time shall an employee have a credit of more than five (5) Personal Business Days. On December 31, 2015, unused leave to a maximum of four (4) days shall be carried over to the next calendar year.
>
> In light of the foregoing, employees shall have until December 30, 2015, to schedule Personal Business Days, with the approval of the Managers involved, so as to ensure compliance with the transition to the five (5) day cap and the four (4) day carry over described above. As of December 31, 2015, any unused leave over four (4) days shall be paid to the employees involved via direct bank deposits, less appropriate deductions. The Company shall make any such payments by January 3`1, 2016."

It is apparent that employees are credited with personal business days "for use in personal or special circumstances." Personal business days, as the term implies, are for the personal use of the employees. Those days are commonly used for such things as, family matters, medical appointments or personal business purposes. Because of the personal nature of the day employees have either a vested or tantamount to a vested interest in those days.

And because of the nature of those days, it is the employee who schedules those days for his/her personal use. While the collective agreement subjects the scheduling of those days "to the Company's operational requirements and agreement [which] shall not be unreasonably withheld" that does not give the Company the authority to appropriate those "personal" business days for the Company's own use. The personal business days belong to the employee and where operational requirements become paramount, it simply allows those personal business days to be put off until another time. The

Company cannot choose to utilize those days for its own purposes, nor can it force the employees to use their personal business days for the Company's purposes since the days belong to the employees for their own use. Accordingly, when the Company mandated that personal business days were to be used in circumstances that were not relevant to the employees' personal use or special circumstances (which are also intended to be personal to the employee), the Company was in breach of Article 14.17 of the collective agreement. In the result, all personal business days taken or appropriated by the Company for the MDO Program shall be returned to the employees for their personal use as mandated by Article 14.17 and, as well, the employees are to be reimbursed for those days.

Banked Time

Article 21.10 "Banked Time – Overtime and Time Balancing" provides as follows:

> "Overtime is earned when the Company requests an employee to work overtime. Banked straight time is earned when an employee requests approval to work additional hours for the purpose of accruing time for time balancing purposes, there is an operational requirement for the work to be done, and the Manager approves the banked straight time in advance.
>
> Employees shall have the choice of having their authorized overtime paid out or accrued as per Article 21.02 and 21.03 in a renewable time bank, subject to the following conditions:

(a) Banked overtime hours shall be properly recorded using the Company's time sheet system, in no less than one-half (0.5) hour increments, to a maximum of thirty seven and one-half (37.5) hours at any time.

(b) Banked straight time shall be properly recorded using the Company's time sheet system, in no less than one-half (0.5) hour increments, to a maximum of thirty seven and one-half (37.5) hours at any time. Authorizations of banked straight time are separate decisions and accumulations of straight time banked time beyond the thirty seven and one-half (37.5) in total will not, by default, be treated as authorized overtime.

(c) With the agreement of their Mangers and subject to operational requirements, employees may use banked time to arrange time off in a patterned way. The pattern shall not be more frequent than a specific day of every third week: the period open to this arrangement shall be June through mid-September.

(d) Unused banked time will be paid out to a maximum of seventy-five (75) banked hours upon termination of employment or as required to eliminate an excess balance.

Here again, there is a personal element to "banked time". In the case of Company authorized time or time requested of an employee to work overtime, the employee has the option of being paid out for the overtime or of having that time accrued and credited in a renewable time bank. Employees also have the option of working additional hours at straight time where the "employee requests approval to work additional hours for the purpose of accruing time for time balancing purposes." In the latter case it is noteworthy that the employees also waive the authorized overtime premiums. In either case, there is a decision made by the employee to have his/her work effort directed to a bank for personal use.

Here again, it is for the employee to determine how that banked time shall be used subject to Article 21.10(c) which requires the employees to use the banked time "to arrange time off in a patterned way" which ""shall not be more frequent than a specific day off every week". And more significantly "the period open to this arrangement shall be June through mid-September".

While the time taken is subject to operational requirements and the agreement of their managers, it does not detract from the parties intent that those days are to be used, although in a patterned and timely way, for the personal use of the employees. As such, the personal nature of the days and their restricted usage give the employees a vested or tantamount to a vested interest in how those days will be used. That those days are subject to operational requirements and the agreement of managers does not give the Company the right to appropriate those days for its own use.

The limited pattern of use and the limited times of the usage to the period between June and September suggest that these days are available to the employees for the summer months, which is another indication of the personal nature of those banked days. If operational requirements and the agreement of a manager preclude the days being used by an employee, the days requested may simply be put off to another day. The agreement of the manager and the operational requirements do not give the Company an overriding or paramount right to have those days utilized for its own purposes. Those days belong to the employees subject to the conditions in Article 21.10, and by requiring the

employees to utilize those personal days in accordance with the MDO Program, the Company violated Article 21.10. More specifically, it required the use of those days outside of both the pattern and the period outlined in Article 21.10(c). In so doing, the Company was in violation of Article 21.10 of the collective agreement and the employees are to have the appropriated banked time, reinstated to their renewable time bank and to be compensated for those days.

Vacation

The relevant provisions concerning vacation are as follows:

14.01 **Vacation Reference Year**

Effective April 1, 2013, the Company shall change the reference year for administering vacations to the calendar year. As a result, all vacation credits administered herein shall be administered on a pro-rated basis between April 1, 2013 and December 31, 2013. Thereafter, said credits shall be administered on a calendar year basis.

14.02 **Vacation Credits**

In order to earn the monthly vacation leave credit, employees must receive salary for at least ten (10) days in the calendar month.

New employees shall earn vacation leave at the rate of 9.375 hours per month) one and one quarter (1 and ¼) days per month). After six (6) calendar months of service, they shall be credited with vacation leave to the extent of the amount that they shall earn to the end of the vacation reference year.

Employees who have completed six (6) months or more service with the Company by December 31st each year shall be credited with annual vacation as follows:

Service	Vacation Credits
½ but less than 6 years	112.5 hours (15 days)
6 but less than 7 years	120.0 hours (16 days)
7 but less than 14 years	150.0 hours (20 days)
14 but less than 16 years	157.5 hours (21 days)
16 or more years	187.5 hours (25 days)

Note: No employee shall lose vacation credits as a result of the change to vacation entitlement set out in 14.02 and 14.04.

(1) See Letter of Agreement Article 14, Leave Plans – Vacation for an explanation of dates listed herein.

14.05 **Vacation Scheduling**

Effective January 1, 2013, employees should submit their preferred vacation dates in writing to their Manager by March 31st each year. When requesting vacation dates prior to this timeframe and/or changes thereafter, employees should provide as much written notice as possible. The dates requested should ensure that vacation leave credits earned in one calendar year are used by no later than the end of the subsequent calendar year.

Managers should approve vacation leave so that the Company's operational requirements are met while taking into account employee preferences. The vacation schedule should be posted electronically and accessible to those employees and Managers with a need to know said schedule by April 30th each year. Approved changes thereto should be posted in the same manner.

Should the Company's operational requirements result in a deferral of an employee's preferred vacation dates, the Manager and the employee involved shall endeavour to re-schedule the vacation at a mutually agreeable time.

Vacations are important times for employees. They provide relief from the stresses of work, opportunities to spend time with families and to travel or pursue matters of self-interest. Summer vacations are generally preferable both because of the weather conditions and also because it enables employees to co-ordinate their vacations with school holidays so that they can spend time with their families. This collective agreement, for the most part, points to that preference by requiring employees to submit their preferred vacation dates by March 31st each year and requiring the vacation schedules to be posted by April 30th each year, all of which suggests that

vacations shall, in the main, commence after April 30th and most likely during the summer months. It is reasonable to infer that most employees would have taken their annual vacation prior to the MDO days selected by the Company.

Under Article 14.02 vacation credits are earned through service and employees are to be "...credited with **annual vacation** ...". Under Article 14.04 the reference year for administering vacations is the calendar year. A careful reading of Article 14 suggest the intent of the parties that there be only one annual vacation in the calendar year and preferably that vacation be after April 30th and most likely in the summer. Article 14 does not contemplate that there be two annual vacations in a calendar year.

Candu's submissions suggest that, since Managers have the right to approve vacation leave so that the Company's operational requirements are met while taking into account employee preferences, the Company has a dominant position insofar as scheduling vacations is concerned, which implies a free hand to schedule vacations at any time it sees fit in order to meet operational requirements. In my view, Article 14.05, as its title suggests, is a procedure for scheduling vacations. It gives the employees a "say" by allowing them to request their preferred vacations **dates**, while giving the Company the right to approve the preferred vacation leave provided operational requirements are met. When the preferred vacation leave is not approved the employee and the manager are to work out a time that is "mutually agreeable."

The Manager only has the right to defer the vacation to a mutually agreeable time. However, when considering the employee's preferred vacation, the Manager has a discretion which it must exercise in a judicious and non-arbitrary way, taking into account both the Company's operational requirements and the employee's preference. This procedural scheduling right of deferral is not the equivalent of a dominant position. More precisely, this scheduling procedural requirement cannot be used as a springboard to provide the Company with the substantive right to arbitrarily schedule vacations at any time it sees fit. The Company's right to schedule vacations is circumscribed by the provisions of the collective agreement. Even where there is a deferral, the vacation must be mutually agreeable. Accordingly, I determine that the Company cannot mandate a second annual vacation in a calendar year or abbreviate the annual vacations for the following year. The Company was entitled to shut down, but it could not force those who had taken an annual vacation to take a second annual vacation in 2014 and use their vacation credits for that purpose. Nor could it force employees to abbreviate or truncate their vacations for 2015 by forcing them to utilize their 2015 vacation credits for the 2014 MDO program.

While the Company has the final say in approving vacation leave, it is also required to take into account employee preferences. It must therefore, as I indicated, exercise its discretion in a judicious and non-arbitrary manner. A significant factor in weighing the competing interests of the employee and the Company, is that, the Company's operational requirements are met. Operational requirements in the context of vacation scheduling has a specific meaning. The intent of the parties is that when the Company considers an individual employee's preference it shall weigh how that

individual's vacation preference will affect the Company's operations and that includes considering such matters are whether the Company has sufficient employees having the same skills as the requesting employee to perform the necessary tasks at the vacations dates requested or whether the Company will have sufficient employees on hand to perform the necessary available work on the dates requested. What is obvious in this case is that where there was a shutdown, the Company did not operate during the shutdown; simply put, there were no operational requirements when the Company was shut down and not operating. This is not a case of considering how the vacation date absence of a single employee would affect the continuing operations of the Company at the individually requested relevant date. I am also of the view that this limited concept of operational requirements applies to both personal days and banked time.

In summary, I determine that Article 14 did not give the Company a dominant or arbitrary right to schedule vacations as it saw fit. The right to defer when procedurally scheduling an individual employee's vacation to a mutually agreeable date does not provide a dominant right to the Company to mandate that all employees utilize their vacation credits during a shut down. Nor does it give the Company the right to schedule a second vacation in a calendar year and truncate a future year's vacation by requiring employees to utilize their vacation credits from either of those two periods. And finally, where there was a shutdown, the Company was not operating and accordingly, there was not a right in the Company to compel employees to utilize their vacation credits during the shutdown. The intent of Article 14.05 was to weigh the individual employee's preference date for a vacation against the operational needs of the Company, that is,

while its operations continued; it did not give the Company the right to order that the employees utilize their vacation credits in the manner ordered by the MDO Program when it was not operating.

However, in arriving at a remedy under this part, it appears that individual or separate considerations may be required for each employee. All employees might not be in the same situation. For example, some employees might not have taken their annual vacation at the time of the MDO Program. I shall remain sized of that issue in the event the parties are unable to agree on what may be the separate considerations affecting individual employees and an appropriate remedy for the individual emplyees.

(iii) Union Recognition

I now turn to consider the conduct of Candu in not discussing its MDO Program with the Union. There is an obligation on Candu pursuant to Article 3.02 to discuss changes to existing Policies and Procedures or the introduction of new policies and procedures. Article 3.02 provides as follows:

> "Changes to existing Policies and Procedures which are not referenced in this Agreement but which may affect working conditions, or the introduction of new Policies and Procedures which may affect working conditions, will not be made without prior discussion with SPEA.

In my view, Candu ignored its obligations to discuss the procedures for vacation time and that is confirmed by Candu's own submissions with respect to vacations which states "that the language at issue is a procedure for requesting time off". Similarly, when referring to Personal Business Days Off, the submissions state "the clause is a procedure for requesting time off ...", and while not using the term procedure with reference to banked time, the submissions state that the relevant Article is a provision that "provides for the pattern in which an employee may arrange to use their banked time". The use of the term pattern, which is mandated by the collective agreement, in my view, refers to the way in which the banked time may be used and is a procedure that would have occurred over a number of years.

The Article also provides the changes to existing policies and procedures and the introduction of new policies and procedures that require discussion are those affecting working conditions. The term working conditions is a broad and general term and encompasses all of the conditions of employment which includes time away from work, such as vacations, banked time off, personal days off and various leaves, such as bereavement leave and union leave. The term is to be distinguished from the term conditions at work. As a result, when the Company implemented the MDO Program, it was required to discuss it with the Society pursuant to Article 3.02. That there were previous discussions which aborted, which did not deal with the situation at hand, does not exempt the Company from its obligations under Article 3.02 to discuss the MDO and its implementation with the Society. Moreover, the situation in issue arose after Candu was informed in August that there would be a delay in the work at Bruce Power which was after the earlier discussions had aborted and are not relevant when considering the MDO Program which was a new concept unilaterally initiated by the Company.

Candu's conduct in notifying the employees of the change in the way it did and by-passing the Society undermined both the Society and the very purpose of the recognition clause which requires Candu to recognize the Society, as the representative of the employees for those matters that fall under Article 3.02. Accordingly, Candu was in violation of Article 3.02 of the collective agreement.

iv Remedy

In the result, I determine as follows:

1) A declaration shall issue that Candu is in violation of Article 3.02 when it by-passed the Society without discussing the changes that it intended under the MDO and also for violating Articles 14 (Vacation Days and Personal Business Days), Article 21 (Banked time), and Article 22 (layoff)..

2) There shall be a cease and desist order that Candu refrain from any further conduct of a similar nature.

3) The employees shall have both their personal business days and banked time reinstated with compensation for those days utilized in the MDO Program. In the event that the parties are unable to agree on the amounts of compensation, I shall remain seized of that issue.

4) The parties are to meet to deal with such further and other remedies, including compensation, if any, for the vacation violations of the collective agreement, as well as for the violation of Article 3.02. In the event that the parties are unable to reach agreement, I shall remain seized of those outstanding issues.

5) Generally, I shall remain seized of all outstanding issues in the event that the parties are unable to reach agreement.

6) The remedy shall apply to all bargaining units (SE and TT) represented by the Society and affected by the MDO Program.

Dated at Toronto this 12th day of January, 2017.

Owen B. Shime, Q.C.