



## Broadcasting Decision CRTC 2011-286

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Route reference: 2010-847

Ottawa, 3 May 2011

**Canadian Broadcasting Corporation**  
Across Canada

*Application 2010-1493-5, received 21 September 2010*

### **bold – Licence amendment**

*The Commission **approves** with changes the application by the Canadian Broadcasting Corporation to amend the nature of service for the Category 1 specialty service known as bold. Dissenting opinions by Commissioners Peter Menzies and Marc Patrone are attached.*

### **Introduction**

1. In *bold – Licence amendment*, Broadcasting Decision CRTC 2010-214, 14 April 2010 (Broadcasting Decision 2010-214), the Commission denied an application by the Canadian Broadcasting Corporation (CBC) to amend the nature of service for the Category 1 specialty service known as bold. The Commission noted the CBC's contention that it faces challenges concerning the availability of off-the-shelf programming from a rural perspective and that the service has limited financial resources to produce original content that serves this purpose. Therefore, the Commission was of the view that it would be acceptable for the CBC to reposition bold's programming strategy to address these challenges while maintaining its orientation as a service for rural Canadians that truly reflects their interests and realities. Accordingly, the Commission directed the CBC to submit an alternate programming proposal for bold that would ensure that:
  - the schedule includes programming that reflects the living realities of rural Canadians;
  - the nature of service is sufficiently specific and representative of the programming strategy; and
  - the service is non-competitive with any existing analog or Category 1 specialty service (to be known as Category A services).
2. In response, the CBC filed an application to amend the broadcasting licence for bold to replace the condition of licence relating to its nature of service. The current condition reads:

The licensee shall provide a national English-language Category 1 specialty television service for rural Canadian families, with a focus on adults 25-54. The service will provide information, interaction and entertainment from a rural perspective.

For the purposes of this condition, “rural Canadians” shall be defined as individuals who live outside of the large urban centres, in small communities, and who predominantly make their living from the land and sea and/or through businesses that are directly associated with those that do.

3. The CBC proposed to replace this condition with the following:

The licensee shall provide a national English-language Category A specialty television service with a focus on adults 25-54. The service will provide information, interaction and entertainment programming dedicated to reflecting Canada’s various regions, including Canada’s rural and non-urban regions, to national and regional audiences. The mandate of the service will be to reflect in its programming the unique tapestry of Canada’s regions, including programming that reflects the living realities of rural Canadians.

For the purpose of this condition, “rural Canadians” shall mean individuals from the three distinct segments of the rural populations as defined by Statistics Canada, namely, individuals from rural non-metro adjacent areas, rural metro adjacent areas and rural northern areas.

4. In its application, which included a sample program schedule, the CBC submitted that its proposal addressed the issues raised by the Commission in Broadcasting Decision 2010-214. Specifically, it noted that:

- the replacement of the current definition of “rural Canadians” in the nature of service by Statistics Canada’s definition reflected today’s diversity among rural areas and rural Canadians;
- the proposed schedule included programs and stories that reflect Canadian experience outside of the country’s major urban centres; and
- the reflection of rural Canada in bold’s programming would ensure that the service was not directly competitive with specialty services such as Showcase and Bravo!

5. The CBC submitted that the only way it could address the Commission’s concerns under the current definition of the nature of service would be to produce approximately 250 hours per year of new in-house and independent productions, which would render the service financially unviable. The licensee also noted that the proposed amendment to bold’s licence would enhance its capacity to address through the network’s general programming strategy part of its mandate under the

*Broadcasting Act*, which is to “reflect Canada and its regions to national and regional audiences, while serving the special needs of those regions.”

6. The Commission received interventions in support of the application, as well as an intervention in opposition by the Independent Broadcast Group (IBG). The interventions and the applicant’s reply can be found on the Commission’s website at [www.crtc.gc.ca](http://www.crtc.gc.ca) under “Public Proceedings.”

### **Commission’s analysis and determinations**

7. Consistent with Broadcasting Decision 2010-214, the Commission considers that the issues that must be addressed in its determinations are the following:
  - Does the proposed schedule include programming that reflects the living realities of rural Canadians?
  - Is the proposed nature of service sufficiently specific and representative of the programming strategy?
  - Would the service as proposed be competitive with any Category A services?

#### **Does the proposed schedule include programming that reflects the living realities of rural Canadians?**

8. The Commission agrees with the IBG that the sample schedule provided by the CBC does not emphasize rural programming since only 14 hours within the 42-hour schedule were identified by the CBC as consistent with its proposed nature of service. Moreover, further analysis indicates that 8 of these 14 hours would be primarily or particularly reflective of Canada’s rural and non-urban regions. The Commission also agrees with the IBG’s view that while some programs broadcast on specialty services may be indirectly related to the nature of service, as argued by the CBC, the overall programming of such services must be consistent with the nature of service.
9. The Commission notes that the CBC has fulfilled the requirement that the schedule include rural programming. However, the Commission expects the CBC to provide a schedule that is entirely consistent with its proposed nature of service, which is to reflect Canada’s various regions, including Canada’s rural and non-urban regions.

#### **Is the proposed nature of service sufficiently specific and representative of the programming strategy?**

10. IBG submitted that the proposed nature of service was too broad and would not maintain a programming orientation for rural Canadians that truly reflects their interests and realities.
11. In reply, the CBC stated that it was necessary to reframe the description of the service to remain true to its original purpose to add diversity to the broadcasting system and provide a service to the underserved rural population, while having the ability to offer

regional programming. The CBC added that bold needs a nature of service description that defines rural Canadians in a modern and effective manner.

12. The Commission notes that the CBC's proposed amendment to the definition of "rural Canadians" is based on Statistics Canada's definitions of rural populations. The Commission further notes that this definition is based on the location of rural populations rather than their occupations, as in the case of the current definition. The Commission considers that this is an appropriate basis for the definition of "rural Canadians." However, the Commission finds that it would also be appropriate to define "programming dedicated to reflecting Canada's various regions" to ensure that the nature of service is sufficiently specific. Accordingly, the Commission has revised the proposed nature of service to include a specific definition of regional programming.

**Would the service as proposed be competitive with any Category A services?**

13. The IBG submitted that the CBC had not ensured that all of the service's drama and arts programming would reflect rural Canadian life or come from a rural perspective and that therefore it would be competitive with Category A services.
14. The CBC replied that the IBG's comments regarding the issue of genre competition should be disregarded since bold does not create competitive issues for the specialty services operated by its members. The CBC also noted that the licensees of Showcase and Bravo!, the two services with which the Commission considered bold would be competitive if its programming were no longer required to be from a rural perspective,<sup>1</sup> did not submit any comments with respect to its application.
15. The Commission considers that the inclusion of a definition of regional programming in the proposed nature of service and the requirement that the schedule include programming that reflects Canada's rural and non-urban regions will ensure that the service will not be competitive with Category A services. Nevertheless, the Commission wishes to remind the CBC that all of the programming on bold must be consistent with its nature of service.

**Conclusion**

16. The Commission considers the CBC's proposal to revise bold's nature of service by including regional programming to be in keeping with the requirements and objectives set out in Broadcasting Decision 2010-214. Accordingly, the Commission **approves** with changes the application by the Canadian Broadcasting Corporation to amend the broadcasting licence for the Category 1 specialty service known as bold to replace the condition of licence relating to its nature of service. The Commission imposes the following **condition of licence**:

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<sup>1</sup> See Broadcasting Decision 2010-214.

The licensee shall provide a national English-language Category 1 specialty television service with a focus on adults aged 25 to 54. The service will provide information, interaction and entertainment programming dedicated to reflecting Canada's various regions, including Canada's rural and non-urban regions, to national and regional audiences. The mandate of the service will be to reflect in its programming the unique tapestry of Canada's regions, including programming that reflects the living realities of rural Canadians.

For the purpose of this condition of licence, "rural Canadians" shall mean individuals from the three distinct segments of the rural populations as defined by Statistics Canada, namely, individuals from rural non-metro adjacent areas, rural metro adjacent areas and rural northern areas.

For the purpose of this condition of licence, "programming dedicated to reflecting Canada's various regions" shall mean English-language programs at least 30 minutes long (less a reasonable amount of time for commercials, if any) in which the principal photography occurred in Canada at a distance of more than 150 kilometres from Montréal, Toronto or Vancouver. Programs in which the principal photography occurred on Vancouver Island will also be considered regionally produced programs.

Programs of News (category 1), Analysis and Interpretation (category 2), Reporting and Actualities (category 3) and Sports (category 6) are excluded.

17. The Commission reminds the CBC that bold's programming must be consistent with its nature of service definition. The Commission will examine the implementation of the CBC's programming strategy at its licence renewal to ensure that bold operates in accordance with this nature of service and that all of the programming is reflective of Canada's various regions, including its rural and non-urban regions.

Secretary General

*\*This decision is to be appended to the licence.*

## Dissenting opinion by Commissioner Peter Menzies

In this decision, the Commission has agreed to permit the CBC, as operator of the Category A (or 1) service originally licensed as Land and Sea and subsequently rebranded as Country Canada but for some time now operating as “bold,” to alter the nature of the service for which it was originally licensed.

The prevailing argument was that to do otherwise would have been unfair to the CBC. This is because the Commission has permitted many other operators of specialty Category A services (a subset of which are digital-only Category A services) to do the same. In that sense, but only in that sense, the decision is fair.

Because in being “fair” to the CBC, the decision exposes a pattern of expedient decision-making that puts the short-term interests of individual broadcasters ahead of the long-term health of the system at large and the best interests of consumers. That is the focus of this dissent.

Those with the privilege of operating a Category A channel do so because they have undertaken to offer programming that appeals to a specific area of interest or “genre” that the Commission believes contributes to the diversity of programming. In order to ensure viability and avoid domination by foreign broadcasters, broadcasting distribution undertakings or BDUs (cable and satellite companies) are ordered by the Commission to carry these services and pay the operators a fee to be negotiated between the two parties. The fee, or more accurately the fees because there are an astounding 67\* Category A licensees, are then passed along to consumers in the form of higher cable and satellite bills. The specific fees are unknown as they are a private transaction between BDUs and licensee. However, Commission staff estimates that based on publicly available data, they range from \$0.04 per subscriber to as much as \$1.51 (excluding subscription-only rates) depending on the service. Assuming (conservatively) that the average cost passed along to BDU subscribers is \$0.25 per channel per month based only on 69 channels (see below), the tab would run to \$17.25 on a monthly cable or direct-to-home (DTH) bill.

**\*(The Weather Network and Teletoon hold just one licence each but operate two services – English and French – so 69 is more accurate. On top of that there are six pay services, five English and one French, which brings the total count of Category A channels to 75. Carriage orders for some ethnic channels have some flexibility but otherwise all of these stations must also be carried by all cable and DTH (direct-to-home) providers in addition to local, regional, provincial educational and community channels that have to be carried in their respective markets. Further, there are the half dozen or so 9(1)(h) services that also must be carried (CPAC, APTN, etc.). Pay-per-view (PPV) services also exist by order.)**

Category A operators also enjoy “genre protection,” which means that the nature of their service is protected from competition. For example, if one were to possess a Category A licence for a channel dedicated to rodeo, no one else would be permitted to create or to offer a competitive channel.

Some of these channels are available on a subscription-only basis, which allows consumers to choose to pay. Many others have, within a variety of rules and regulations, been granted orders insisting they be carried on basic, on part of a high penetration tier, etc. In these cases, consumers are to all intents and purposes ordered by the Commission to subscribe to these channels regardless of their interest in them. (To the current Commission's credit, as of August 31, 2011, when the new BDU regulations come into effect, there will be no more orders on how Category A services are carried, although the order that they must be carried remains.)

Some of these services have been hugely successful. TSN for instance abandoned its regulatory crutches to negotiate its value with BDUs on the strength of its popularity with consumers. Others, despite powerful regulatory aids, have been unable to build the audiences needed to achieve a required return on investment. They have therefore sought and been consistently granted relief from their obligations (but not their rights and entitlements) by the Commission. As a result, much of the programming now offered by Category A "specialty" operators therefore bears little if any resemblance anymore to the specific "genre" programming that justified the granting of the licences, the imposition of costs on consumers and the suppression of competition.

Allowing the dilution of the Category A "genres" into an increasing clutter is disrespectful of the interests of consumers. It also inhibits the opportunity for innovation and excellence that is the purpose of the open-entry Category B (or 2) licences and interferes with the normal life-cycle of the marketplace. This leads to an over-supply of product that in the long term harms the health of the industry, while simultaneously increasing the costs of the system to consumers and reducing choice. Proof of this is that in the history of this licensing (since 1993) staff can recall only one licensee – the Women's Sports Network – that has gone dark.

Further, by perpetuating a regime that is unnecessarily costly to consumers and carriers, the Commission is positioning the industry poorly in terms of its ability to adapt to the 21<sup>st</sup> century's new media environment and competition from alternative information and entertainment providers. That should be of concern to broadcasters, producers and the artistic community. They might well consider whether the maintenance of regulatory/consumer subsidy for even the least successful Category A operators is in their own long-term interests if it means BDUs are handicapped in a way that makes it difficult to compete with Internet "TV" (foreign and domestic).

This decision was approved by the narrowest of margins. Hopefully, that fact and this dissent will make the point that the Commission must move from an era of protectionism to a 21<sup>st</sup>-century approach that emphasizes the relationships between producer, provider and consumer and that will allow Canadians – to the greatest extent possible – to pay for and watch that which they prefer in a fashion that they find most satisfactory.

The perpetuation of decision-making that restricts consumer choice, sustains unjustifiable costs and suppresses artistic and commercial innovation is not in the best interest of Canadians or the system that is licensed to serve them.

## **Dissenting opinion by Commissioner Marc Patrone**

I diverge from my learned friends on this decision to point out that bold represents a broken promise to Canadians, the promise being to provide a service that “focused on the rural perspective.” The decision to license this specialty service was a public matter and it is the public to whom we must ultimately be accountable for a) the licensee’s failure to deliver on that which was promised and b) the regulator’s failure to hold this licensee to account.

With this decision, we allow the public broadcaster to turn its specialty service into what I consider “CBC 2,” an extension of its over-the-air service. We are, in effect, rewarding the public broadcaster for renegeing on its obligations and essentially making a mockery of the licensing process. During my time here, I can recall no other regulatory instance where the product delivered by a licensee fell so short of what was originally promised.

When the CBC and Corus Entertainment applied back in 2000 for a licence to launch a channel aimed at reflecting the nation, Canada’s rural lifestyle, I can see why the Commission thought it was a good idea. Rural Canadians represent an underserved demographic. If private enterprise could not find the commercial impetus to serve this demographic by itself, then perhaps a public/private partnership could provide such a service. Corus would bring to the table its experience in operating specialty and radio services, while minority shareholder CBC would bring a capacity to provide programming from “its archives, much of which has received limited exposure.”

As the Commission pointed out in Decision 2000-453:

The majority of current Canadian television services are urban-oriented. This diverse new service will emphasize rural themes and embrace and respect rural values and lifestyles.

The Commission took a bold step – no pun intended – and issued a licence for a service that would provide a unique voice that spoke to the rural Canadian perspective. As the decision stated, this would be

[...] [a] channel that embodies the traditions and embraces the rural character of the many diverse regions of Canada...that celebrates the past while navigating the future...a living record of rural life and business in Canada.

In return the applicant secured a highly coveted “Category 1” licence, making it a service that distributors “must offer” to customers. There would be no need to negotiate for carriage because the nature of the licence would require that carriage be guaranteed. The Commission accepted the applicant’s commitment in good faith. That was then.

In 2002, two years after the licence was awarded, the CBC secured sole ownership and “rebranded” the station. Country Canada eventually became bold and it was soon clear that the changes went well beyond “branding.” For a time the CBC used the service to broadcast content that appeared competitive with Bravo! and Showcase. The service ran

afoul of the regulator and the CBC was ordered to appear before a “show cause” hearing to answer for failing to comply with its conditions of licence. In reply, the public broadcaster produced a survey showing its content was appreciated by Canadians in rural parts of the country. When that didn’t sway the Commission, the broadcaster pleaded “no contest” but it never reverted back into the service intended.

Of what do the “living realities of rural Canadians” consist today? In looking at a random sampling of bold’s offerings, the service features programming that includes popular U.S movies and series along with performing arts fare. According to its website, bold also boasts Jian Ghomeshi, Cirque du Soleil, *The Tudors*, and the British serial *Funland*, which is described as “dark,” “seedy” and “cunning.” The CBC even moved World Cup Soccer games onto bold. While rural Canadians may enjoy sporting events, it’s hard to imagine “World Cup” soccer being particularly reflective of rural Canadians’ lifestyle, especially given that event’s complete lack of Canadian content.

Somewhere along the way, CBC management deemed that it was not in its interests to live up to its conditions of licence and so it simply ignored them by airing content that had nothing to do with the audience it was intended to serve. By 2008, bold was describing itself as “home to the world’s best performing arts, intelligent drama and daring comedy.” Bear in mind, it had yet to secure permission from the Commission to deviate from its original conditions of licence. It just went ahead and did it.

The CBC claims the service is no longer “viable” under the previous conditions. It claims there is a lack of rural-centric programming despite the fact that in its original application, it claimed to have relevant shows that had hitherto received “limited exposure.” It has threatened to “pull the plug” on the service. I would argue that if the CBC can’t or won’t do what it promised to do, then it should relinquish the licence rather than simply airing what it wants. If that sounds extreme then consider the intervention by the Independent Broadcasters Group, in which it contends that the sample schedule is not reflective of rural Canadians, that the proposed nature of service is too broad and that the service appears to remain competitive with existing specialty services. It further contends that the Commission should direct the CBC to operate bold in accordance with its existing nature of service or **relinquish its licence** [emphasis mine].

The CBC was awarded a licence to do something and fell very short of doing it. In so doing it has conducted itself in a manner utterly disrespectful, even contemptuous of the Commission and our process. Despite all that, a bare majority of my colleagues agreed to a decision that allows CBC’s bold to operate under watered-down conditions. For instance, the new mandate of the service will be:

[t]o reflect in its programming the unique tapestry of Canada’s regions, including programming that reflects the living realities of rural Canadians.

There is little here that compels bold to distinguish its content from many other services that, even by accident, are bound to include *some* programming that reflects the living realities of rural Canadians. The service went from “embracing” rural values to barely acknowledging them. This decision effectively grants the CBC a licence to continue

airing content that is all over the map. It can offer sports, news, current affairs, drama and comedy.

While it's true that bold has been asked to commit to "regional programming," the service has the potential to morph into an all-purpose channel onto which the CBC can move potential ratings winners so as to boost subscriber revenue. There is nothing original here that warrants a "Category 1" specialty status. Why must television distributors continue to be forced to offer customers a service that contributes nothing unique to the broadcast system?

In closing, I stated from the outset that the regulator and the licensee are ultimately accountable to the public for what happens with this licence. Being that it was a public process that led to the licensing of this channel, the public has a right to wonder what happened and why. More troubling than the derisive manner with which the CBC ignored its conditions of licence is that we acquiesced to changes that so significantly reduce the service's commitment to rural Canada. I understand this is strong language, but how else can one realistically describe the chasm that separates the promises made in the original application from the service provided. The licence is public property and should be treated with respect. It was issued in good faith under terms that were later treated with disdain, even contempt, by the licensee. The public deserves to have this licence returned.