
Land Management Manual

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Designations

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1.0 Introduction

- 1.1 Bands that operate under the [Indian Act](#) can designate reserve land or designate lands that are intended to be added to or set apart as a reserve for leasing or other purposes. When a Band designates land, it allows the Minister to grant land instruments that allow for exclusive use of a specified portion of the reserve to a third party for economic development or other purposes while the designated lands remain reserve lands.
- 1.2 All designations require the informed consent of eligible electors (Band electors). Informed consent for a designation must be obtained through a vote held in accordance with the [Indian Referendum Regulations](#).
- 1.3 A designation for leasing is not an absolute surrender. For more information on absolute surrenders, please see chapter five in the 2002 [Land Management Manual](#).
- 1.4 Several types of land uses are not allowable on designated lands. The following sections of the [Indian Act](#) are not compatible with designated lands:
- a) setting land aside under s.18(2) (e.g., schools, community or social housing);
 - b) allotting and transferring allotted land under sections 20 – 25;
 - c) section 28 (including authorizing permits under s.28(2)) – permits may be issued on designated land pursuant to s.53(1)(b);
 - d) Indian estate matters under sections 42, 44, 46, and 48 – 51; and,
 - e) sections 58 and 60 (which include granting leases of uncultivated land and locatee land and delegations of management authority over reserve land).

Types of Designations

- 1.5 There are two broad categories of designations: general and specific. When general and specific proposals are considered together under one referendum, it is commonly referred to as a combination designation.

General Designations

- 1.6 A general designation is one where no specific or immediate project is planned, but land is designated for a range of defined potential uses. General designations are used in anticipation of future development so that a Band may be in a position to quickly lease reserve land when a specific project arises.

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Specific Designations

- 1.7 A specific designation is when a specific project and/or activity (e.g., a small area of land for a gas station, a strip mall or rental cottages) is proposed for a parcel of reserve land.
- 1.7.1 Specific designations do not require a negotiated lease for the purposes of the referendum, but mandatory terms, including the land description, duration, proposed use, consideration and rental structure must be clearly stated in the Designation Document.

Combination Designations

- 1.8 A combination designation may be used when a specific project is being contemplated for part of the lands, but a Band wishes to designate, under a general designation, additional reserve lands to provide for other potential uses in the future.

Pre-Reserve Designations

- 1.9 Pre-reserve designations are available to Bands through the [Addition of Lands to Reserves and Reserve Creation Act](#). A pre-reserve designation identifies land for a specific or general purpose prior to that land receiving reserve status. If the Band Council has requested that the Minister set apart certain lands as a reserve, the Band may designate any interest or right in or to the lands, including for the purpose of the replacement of an existing interest or right in or to those lands. By obtaining a pre-reserve designation, the Band can assure itself that the land can be used for the intended purpose(s) before advancing through the addition to reserve process. Where there is an existing exclusive use business on the land where an [Indian Act](#) lease will be required upon reserve creation to satisfactorily replace an existing third-party interest or right, a pre-reserve designation is required before the lands may be added to reserve.

Phases of a Designation

- 1.10 There are three phases of the designation process:
- 1) **Preparation Phase** — The Band identifies lands to designate and addresses issues relating to existing allotments, interests or rights. During this phase, the department works with the Band Council to identify and address issues, and prepare the Designation Document.
 - 2) **Referendum Phase** — The department works with the Band Council to ensure the designation meets the requirements of the [Indian Act](#), the [Indian Referendum Regulations](#), and related departmental policies (such as these policies), and to address any issues not resolved during the preparation phase.

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- 3) **Final phase** — Following a successful referendum, the signed Designation Document is submitted to the Minister with a Band Council Resolution recommending Ministerial acceptance.

2.0 Preparation Phase

Environment

- 2.1 Environmental processes such as site assessments, reviews, and audits may be required. Departmental environment officers must be included early on in planning stages and before the issuance of a lands instrument to ensure appropriate environmental considerations have been taken.

Independent Legal Advice

- 2.2 The department recommends Band Councils seek independent legal advice in all circumstances. In some instances, this will be a requirement. In cases where a Band Council does not wish to obtain independent legal advice, a Band Council Resolution stating that they have chosen not to obtain independent legal advice will be required.

Individual, Band and Third Party Interests or Rights

- 2.3 Reserve land that is to be designated must be unallotted and free of incompatible encumbrances or charges.
- 2.4 At the outset of a proposed designation, an encumbrance or charge check must be conducted to identify, to the extent possible, all registered surface and subsurface encumbrances or charges (i.e., third party interests or rights, locatee interests or rights, Indian Oil and Gas Canada interests or rights, etc.) in the [Indian Lands Registry System](#).
- 2.5 After an encumbrance or charge check has been completed, a Land Status Report must be generated and provided to the Band Council. It is the Band Council's responsibility to review this report and take any appropriate steps to address possible issues. The department does not provide representations or warranties regarding encumbrances or charges and does not guarantee that the Land Status Report will identify all encumbrances or charges. Consequently, there may be other unregistered encumbrances or charges.
- 2.6 Although not required, it can be useful to compare aerial or satellite imagery of the proposed designated lands against the known encumbrances or charges to determine if infrastructure exists for which there is no registered land tenure or

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rights. It can also be useful for the departmental lands officer to ask the Band Council to confirm if there are any encumbrances or charges (such as underground infrastructure) other than those identified in the Land Status Report.

Locatee Interests or Rights

- 2.7 A locatee must be notified in writing if there is a proposed designation on any part of their land. If a Band representative has not notified the locatee, a departmental official must do so.

- 2.8 If the locatee agrees to a voluntary transfer of their interest or right in the affected lands to the Band under s.24 of the [Indian Act](#), the transfer must be finalized prior to the referendum.

Note: A quit claim deed or abandonment is not an acceptable means of extinguishing lawful possession.

- 2.9 If the Band Council and the locatee cannot agree on a voluntary transfer under s.24 of the [Indian Act](#), the locatee's land must be excluded from the designation or the department will not proceed any further with the proposed designation.

Custom Interests or Rights

- 2.10 Not all Bands use the allotment provisions of the [Indian Act](#). Some Bands provide individual Band members rights to certain reserve lands by the custom or tradition of the Band. Since the department is not involved in addressing or negotiating these interests or rights, the Band Council must extinguish these interests or rights or exclude them from the lands proposed for designation prior to the referendum vote.

Third Party Interests or Rights

- 2.11 The department and Band Council must discuss any pre-existing registered encumbrances or charges to determine if the interests or rights are compatible with the proposed designation. If they are compatible, the designation should be made subject to such interests or rights. Since land subject to incompatible interests or rights cannot be included in the designation, those incompatible interests or rights must be either extinguished or excluded from the lands proposed for designation prior to the referendum vote.

Unauthorized Third Party Interests or Rights

- 2.12 On occasion a Band may seek to designate reserve land on which there is an existing business without a valid lease (known as a buckshee lease). Such a business is not authorized under the [Indian Act](#) [per s.28(1)] and the Band must designate the land to provide a lease for lawful operation to a third party.

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Band infrastructure

- 2.13 Designated lands should not include any lands used or intended to be used for the general welfare of the Band under s.18(2) of the [Indian Act](#), such as schools, water treatment plants and health facilities.

Access

- 2.14 Designated lands must be accessible and the proposed designation must not create landlocked parcels of land.

Mandatory Terms to be included in the Designation Document

- 2.15 The Band Council sets the terms of a proposed designation, although the terms are often subject to negotiation with the department due to the legislation and policies that specify when the Minister may accept a designation proposal. For example, if the proposal includes leasing for nominal rent, then it must also identify the benefits accruing to the Band in lieu of fair market rent. As the terms of a proposed designation may be complex and involve significant risk, it is recommended that Bands seek independent legal and financial advice.
- 2.16 The Band Council must provide detailed project information to Band electors within the Designation Document and the Information Document. Mandatory information requirements include: the land description, duration, proposed use, appraisal, consideration, amending and revoking clauses, and where applicable for a general designation, consent to subsequent leasing. These mandatory information requirements are discussed below.

a. Land Description — Mandatory

- 2.16.1 The description of the land set out in the Designation Document must meet the requirements contained in the [Interdepartmental Agreement](#) between the department and Natural Resources Canada.
- 2.16.2 The department does not provide representations and warranties with respect to encumbrances or charges and does not guarantee that the Land Status Report will identify all encumbrances or charges. Consequently, there may be other unregistered encumbrances or charges. The land description should detail all encumbrances or charges identified in the department's Land Status Report. The department's search of title is informational in nature. The report is designed to provide a record of all relevant documents that have been deposited in the [Indian Lands Registry](#) in connection to the parcel in question. The requestor(s) is then responsible for arriving at their own (legal) opinion as to the ownership and interests or rights of the land and mineral rights.

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b. Duration — Mandatory

- 2.16.3 It is recommended that a designation be for a fixed term. The Band may designate for an indefinite term; however, a lease must always be for a fixed (i.e., finite) term. If a designation is for a fixed term, any lease issued pursuant to that designation cannot expire after the end date of the designation.

c. Proposed Use — Mandatory

- 2.16.4 The proposed land use must be clearly identified in the Designation Document. Uses can range from very specific (e.g., a gas station) to a broad category or categories (e.g., residential, commercial, and industrial) or the use may be conditional upon zoning (e.g., any uses explicitly authorized under a zoning bylaw of the Band). Broad terms such as “ancillary uses” or “all lawful purposes” are not acceptable.
- 2.16.5 When designating for broad categories of uses, Band Councils should ensure the categories are consistent with any land use planning definitions in the Band’s land use plan, if any, and consider relevant limits, conditions or prohibitions of specific activities. For example, a definition for “agriculture” could limit livestock types (e.g., hogs), impose limits on herd size, prohibit certain crops (e.g., cannabis), or prohibit certain agricultural practices (e.g., monoculture).

d. Appraisal — Mandatory

- 2.16.6 The Designation Document must state that prior to the issuance of any lease, fair market rent of the “highest and best use” of land must be determined through an appraisal process.

e. Consideration — Mandatory

- 2.16.7 The Designation Document must state whether the consideration will be based on a fair market rent appraisal, or whether consideration will be for nominal rent.
- 2.16.8 Future leases under a general designation may not be for joint ventures with nominal rent. Under certain conditions, specific designations may allow leases for joint ventures with nominal rent (see section 2.19).
- 2.16.9 If a Band proposes that any lease be at less than fair market rent, the Designation Document must state that the lease must be structured so that 100% of the benefits of the lease go to the Band. Two examples of how this has been achieved in the past are:
- a) having a corporation, 100% of the shares of which are held in trust for the Band; and,

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- b) having a limited liability partnership, the sole limited partner of which is restricted to being the Band and the general partner of which is a Band corporation.

2.16.10 The Designation Document must state that where a lease provides for reduced or nominal rent to a Band-owned corporation, any subsequent transfers or subleases to non-Band-owned entities are required to be at fair market rent.

f. Amending and revoking clauses in the Designation Document — Mandatory

2.16.11 A Designation Document must provide the Band Council with the authority to:

- a) amend the terms of the designation to correct clerical or minor errors; and,
- b) revoke the designation (in part or in whole) for parcels of land where no interests or rights have been granted.

g. General Designations and Consent for Subsequent Leasing — Mandatory

2.16.12 As general designations are used in anticipation of future development and can be used for a range of potential uses, leasing specifics are likely to be unknown at the time of the designation. The Designation Document must state that when the Band Council is ready to lease it will obtain consent for the lease through its own community approval process.

Optional Terms that may be included in the Designation Document

Rent Payment Arrangements — Optional

2.17 A designation may contemplate a deferred rent or non-standard payment arrangement. In such a circumstance, those payment arrangements must be authorized in the designation document. For more information, please see the *Leasing on Designated Reserve Land* policy.

Non-Disturbance Agreement — Optional

2.18 The Designation Document must authorize the use of a non-disturbance agreement if the lease and/or sublease contemplates the use of a non-disturbance agreement.

Joint Ventures with Nominal Rent — Optional for Specific Designations only

2.19 For a specific designation to allow nominal rent for joint ventures to which a Band (or a Band-owned corporation) is to be a party, the Band Council must:

- a) ensure the joint venture is structured so that 100% of the Band or Band-owned corporation's portion of the benefits from the project go to the Band;

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- b) obtain an appraisal of the fair market rent to be expected if they were leasing the land directly to a developer;
- c) obtain a Certificate of Financial Advice and a financial report stating the proposal would likely provide a return greater than fair market rent to the Band or Band-owned corporation. The report must also clearly identify the level of risk (e.g., high, medium, or low risk tolerance);
- d) obtain a Certificate of Independent Legal Advice; and,
- e) include any other relevant information relating to the joint venture in the Designation Document.

Revoking and/or Amending Historical Surrenders for Leasing

- 2.20 To ensure informed Band electors' consent to proposed leases, it is strongly recommended that existing historical surrenders (i.e., designations pre-1988) for general leasing purposes and/or with no specific end date be amended or revoked through a vote under the [Indian Referendum Regulations](#). It is recommended that the department and Band Council consult with their respective legal counsel when considering this option.
- 2.21 If a historical surrender states leases shall be issued to a specific third party (e.g., XYZ corporation), a Band Council Resolution may be used to revise the specific third party by removing XYZ corporation which would enable leasing to any third party, as long as the proposed use remains similar to the original designation.

Interim Use and Occupation Permit

- 2.22 Section 28(2) may be used to authorize the interim use and occupation of reserve lands to carry out construction while the Band goes through the process of designating the lands for a lease. Interim Use and Occupation permits will be considered on a case-by-case basis.

Note: These permits should be used with caution. If Band electors do not subsequently agree to the project and do not designate the land, the permittee will be responsible for the full cost of removing the improvements and returning the land to its previous condition. If considering this type of permit, confer with departmental headquarters and regional legal counsel.

3.0 Referendum Phase

Request for Referendum

- 3.1 A Band Council Resolution must be submitted to:

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- a) request the Minister order a referendum;
- b) inform the department of the date, time and place planned for the information meeting and the referendum vote;
- c) request that an electoral officer be appointed; and,
- d) confirm the terms and conditions stipulated in the Designation Document.

- 3.2 This information must be finalized and provided to the department no later than 20 business days prior to posting the Notice of Referendum.
- 3.3 A referendum must not be scheduled within 30 days of a Band Council election.

Appointment of an Electoral Officer and Deputy Electoral Officers

- 3.4 An electoral officer must be appointed through a Ministerial Order prior to the creation of the voters list.
- 3.5 It is recommended the electoral officer appoint at least two deputy electoral officers. At least one of the deputy electoral officers should be a member of the Band, if possible.

Voters List

- 3.6 A voters list comprised of Band electors (including off-reserve members) must be created.

Information Document

- 3.7 The Band Council must provide the electoral officer with an Information Document, which is separate from the Designation Document and may include additional information for the Band electors. The Information Document is to be posted and made available to Band electors for all proposed designations in advance of the information meeting.
- 3.8 The Information Document should contain all information that the Band Council considers necessary (e.g., any additional benefits such as employment and taxation) for Band electors to give their informed consent to the designation. Information provided in this document must not conflict with the Designation Document.
- 3.9 If the designation contemplates the land being leased at reduced or nominal rent, this must be identified in the Information Document.

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Voting Package for Off-Reserve Band Electors

- 3.10 The electoral officer or a deputy electoral officer must mail or deliver a voting package to every Band elector who does not reside on the reserve and for whom an address has been provided. The package must include:
- a) the Designation Document(s);
 - b) the Information Document to be discussed at the information meeting(s);
 - c) the date, time and location of the information meeting(s);
 - d) the Notice of Referendum;
 - e) a mail-in ballot, initialled on the back by the electoral officer, stating the question to be submitted to the Band electors;
 - f) an outer, postage-paid return envelope, pre-addressed to the electoral officer;
 - g) a second, inner envelope marked "Ballot" for insertion of the completed ballot;
 - h) a voter declaration form; and,
 - i) a letter of instruction regarding voting by mail-in ballot.
- 3.11 If a postal strike occurs after the Notice of Referendum is posted and before the referendum day, the mail-in ballots will be accepted after the referendum for the number of days equivalent to the duration of the postal strike during that period.

Postponing a Referendum

- 3.12 If unforeseen circumstances cause a significant disruption in the referendum process, a Band Council may request a postponement of the referendum with a Band Council Resolution. The department and the Band Council must ensure that the postponement and any changes in referendum timing and process are communicated to Band electors.

Information Meeting

- 3.13 The Band Council must hold at least one information meeting to share relevant information on the proposed project(s). If necessary, an interpreter should be present.
- 3.14 The electoral officer must attend at least one information meeting to explain the referendum process. If travel or health restrictions are in place, the electoral officer may attend remotely/virtually.
- 3.15 The electoral officer or departmental representative must take minutes of the information meeting to document the information provided to the Band electors prior to the designation vote. If the electoral officer is unable to attend due to

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exceptional circumstances, the department will accept the attendance of a deputy electoral officer or a certified copy of the minutes from the Band Council.

Vote Requirements

- 3.16 Section 39.1 of the [Indian Act](#) requires that for a designation to be valid, it must be assented to by a majority of Band electors voting at a referendum held in accordance with the [Indian Referendum Regulations](#). In keeping with a plain reading of the [Indian Act](#) and the [Interpretation Act](#), the term “majority” in section 39.1 means “the greater number of votes” cast in favour of a result (i.e., either for or against the designation proposal). In this instance, the term “majority” does not mean over 50% of the votes cast.
- 3.17 With a plain reading of s.39.1 of the [Indian Act](#), rejected ballots, while understood to be votes cast, are not to be calculated as *de facto* “no” votes.

For example, 100 electors cast ballots; 49 vote in favour of the proposal, 48 vote against the proposal, and 3 ballots are rejected. In this instance, the greater number of votes cast in favour of a result are the 49 votes cast in favour of the proposal. The 3 rejected ballots are still recorded as votes cast but do not affect the outcome. In this instance, the designation is passed successfully.

Referendum Documentation

- 3.18 The electoral officer must complete a statement of vote results. The electoral officer and the Chief, or a member of the Band Council, certifies the designation.
- 3.19 If the designation is successful, the Band Council must sign the Designation Document.

4.0 Requesting a Review of the Referendum

- 4.1 A Band elector may request a review of the referendum where the elector believes there has been a contravention of the [Indian Referendum Regulations](#) or corrupt practice(s) in connection with the referendum.

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5.0 Approval Phase

Ministerial Acceptance

- 5.1 If the vote is successful, and a request for review is not received, then the Band Council recommends by Band Council Resolution that the Minister accept the designation by ministerial order.
- 5.2 If a Band does not consent to a proposed designation, the electoral officer must still document the results of the vote. Documents must be kept on file in the respective regional offices but are not submitted for approval or registration.
- 5.3 A designation of reserve land is effective on the date accepted by the Minister.
- 5.4 A pre-reserve designation requires ministerial acceptance and takes effect once the lands are set apart as reserve lands.

Registration in the Indian Lands Registry

- 5.5 Designations and any associated documentation, including forms and agreements, must be prepared in a form suitable for registration in the Indian Lands Registry and must, in accordance with s.55 of the [Indian Act](#), be sent for registration in accordance with the requirements of the [Indian Lands Registration Manual](#).

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Annex A: Authorities for Designating Lands

Authorities for Reserve Land Designations

Departmental policy for designations is governed by s. 37(2), 38(2), 39.1, 40.1, and 41 of the [Indian Act](#).

Subsection 38(2) of the [Indian Act](#) allows a Band to designate all or part of its rights and interests in a reserve.

In accordance with s.39.1, a designation is valid if:

- a) it is made in favour of His Majesty;
- b) is assented to by a majority of the electors at a referendum vote held according to the [Indian Referendum Regulations](#);
- c) the Band Council recommends the designation to the Minister through a Band Council Resolution; and,
- d) the designation is accepted by the Minister.

Section 40.1 states that a designation that has been approved in accordance with s.39.1 will be certified under oath by a departmental officer and the Chief or a member of the Band Council.

Section 41 of the [Indian Act](#) deems a designation to confer all the rights necessary for His Majesty to carry out the terms of the designation.

A designation will only be accepted by the Minister where the relevant statutory provisions and departmental policy requirements are satisfied.

Relevant Statutory Requirements

The relevant sections of the [Indian Act](#) are as follows:

Other transactions

37 (2) Except where this Act otherwise provides, lands in a reserve shall not be leased nor an interest in them granted until they have been designated under subsection 38(2) by the band for whose use and benefit in common the reserve was set apart.

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38 (2) A band may, conditionally or unconditionally, designate, by way of a surrender to Her Majesty that is not absolute, any right or interest

of the band and its members in all or part of a reserve, for the purpose of its being leased or a right or interest therein being granted.

Conditions — designation

39.1 A designation is valid if it is made to Her Majesty, is assented to by a majority of the electors of the band voting at a referendum held in accordance with the regulations, is recommended to the Minister by the council of the band and is accepted by the Minister.

Certification — designation

40.1 (1) A proposed designation that is assented to in accordance with section 39.1 shall be certified on oath by an officer of the Department and by the chief or a member of the council of the band.

Ministerial decision

(2) On the recommendation of the council of the band, the proposed designation shall be submitted to the Minister who may accept or reject it.

Effect of surrenders and designations

41 An absolute surrender or a designation shall be deemed to confer all rights that are necessary to enable Her Majesty to carry out the terms of the surrender or designation.

Authorities for Pre-Reserve Designations

Departmental policy for pre-reserve designations is governed by the [Addition of Lands to Reserves and Reserve Creation Act](#), S.C. 2018, c. 27, s.675.

Extracts from the [Addition of Lands to Reserves and Reserve Creation Act](#)

Designation:

5 (1) If the governing body of a First Nation has requested that the Minister set apart certain lands as a reserve, the First Nation may designate, conditionally or unconditionally, any interest or right in or to the lands, including for the purpose of the replacement of an existing interest or right in or to those lands. The designation may be made either

(a) before the title to the lands or the administration and control of the lands are transferred to Her Majesty in right of Canada; or

(b) before the lands are set apart as a reserve under section 4.

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Application of Indian Act:

(2) Sections 39.1, 40.1 and 41 of the Indian Act apply in respect of a designation under subsection (1), any references to Minister in those sections being read as references to Minister, as defined in this Act.

Power of the Minister:

(3) On the acceptance by the Minister of a designation made under subsection (1), the Minister may grant the designated interest or right to a person or entity.

Effect:

(4) If a designation made under subsection (1) is accepted by the Minister, the designation takes effect at the time the lands are set apart as a reserve under section 4. Any resulting grant of the designated right or interest, if the grant is made before the lands are set apart as a reserve, also takes effect at the time the lands are set apart as a reserve.

Certain acts deemed to have been done under Indian Act:

(5) As of the time when the Minister sets apart any lands as a reserve under section 4, any designation made under subsection (1), and any resulting grant that was made under subsection (3), are deemed to have been designated or made, as the case may be, under the Indian Act.

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Annex B: Relevant Case Law

These are considered the leading cases pertaining to designations. This is not intended to be all inclusive or exhaustive:

- a. Guerin v. The Queen, [1984] 2 SCR 335
- b. Blueberry River Indian Band v. Canada (DIAND), [1995] 4 SCR 344
(*Apsassin*)
- c. St. Mary's Indian Band v. Cranbrook (City), [1997] 2 SCR 657