

Lawyer:

Lakes are included in the definition of water bodies in the *Water Act*. As water bodies, lakes are “locations where water flows or is present, whether or not the flow or presence of water is continuous, intermittent or occurs only during a flood.” Wetlands are also considered water bodies. While lakes and wetlands are both water bodies, what is the difference between a lake and a wetland? This question was put before the Court of Queen’s Bench in Alberta in 1983 in the case of *Alberta v. Very*, 1983 CanLII 1065 ABQB. At the time, Mr. Justice Egbert explained as follows: “Anyone who has grown up in the prairie provinces of Canada has a preconceived notion of what is a lake and what is a slough. A lake, to that person, is a body of water of considerable depth surrounded by a well-defined beach or bank and with a reasonably permanent nature where one can swim if the water is not too cold. On the other hand, a slough is a shallow body of dirty water usually full of weeds and insects or aquatic life where one would not consider swimming. Sometimes there is water present in the slough and sometimes there is not.” (*Alberta v. Very*, at para. 41). Mr. Justice Egbert relied on the expert evidence provided by Mr. Peiluck, who, at that time held “a B.Sc. in micro-biology and geomorphology from the University of Manitoba and an M.A. in resource and recreation planning from the University of Saskatchewan.” According to Mr. Justice Egbert, Peiluck “compared a lake with a slough in the following manner:

- (i) Lakes tend to have well-defined shorelines whereas sloughs have poorly-defined shorelines.
- (ii) Water levels tend to be more stable in lakes than in sloughs.
- (iii) Open water is more common in lakes while vegetation is more dominant in sloughs.
- (iv) The depths of lakes vary greatly while sloughs tend to be shallow.
- (v) Lakes tend to be less sensitive to natural and man-made changes.” (*Alberta v. Very* at paragraph 24.)

The following paragraphs from *Alberta v. Very* provide Mr. Justice Egbert’s findings with respect to a legal definition of a “lake”.

[37] There is very little jurisprudence, if any at all, to be found in the Commonwealth countries defining the word “lake”. I was not directed to any case by counsel, nor could I find any in my research, which could materially assist me. There are, of course, a number of English and Canadian cases dealing with the distinction between surface water, i.e., water falling from the heavens on the surface of the earth in the form of rain or snow, and water flowing through a defined channel, but these cases all dealt with the rights of riparian owners to such water and the use and disposition thereof and are of no particular significance in deciding the question at bar. Dictionaries are likewise of not much assistance in arriving at the legal definition of a lake. For instance, the Shorter Oxford English Dictionary, 3rd ed., defines lake as being a large body of water surrounded by land but this definition does not indicate the source of the water in a lake or whether it has any permanent inflow or outflow of water. Black’s Law Dictionary, 5th ed.

(1979), defines lake as, inter alia, a considerable body of standing water in a depression of land but it also defines lake as meaning a widened portion of a river.

[38] Counsel for the applicant has relied heavily on United States authorities in arriving at a definition for a lake. In Farnham's *Waters and Water Rights* (1904), vol. II, which has been referred to and relied upon in this country, may be found the following passage at pp. 1560-61:

In order to constitute a water course the water must have a current. It cannot be stagnant, nor spread out so as to destroy the current. If the water spreads out so that the current becomes imperceptible or is lost, the water becomes a lake or pond, and is no longer a water course. In *Trustees of Schools v. Schroll* (1887), 12 N.E. 243, 120 111. 509 (S.C.), it is said that the distinction between a stream and a pond or lake is that, in the latter case, the water is, in its natural state, substantially at rest.

[39] I have also been referred to a decision of the Nebraska Supreme Court, *Block v. Franzen* (1956), 79 N.W. (2d) 446 at 450, in which Simmons C.J. had this to say, quoting from Restatement, Torts, p. 324, para. 842:

The term "lake" as used in the Restatement of this Subject, comprehends a reasonably permanent body of water substantially at rest in a depression in the surface of the earth, and also the depression, both depression and body of water being of natural origin or a part of a watercourse ... A distinction is sometimes made between lakes and ponds; the term "lake" connoting a large body of water and the term "pond" connoting a small body of water ordinarily containing considerable aquatic growth. But since this distinction is based mainly on the size of the body of water, it is not essential for legal purposes, and the term "lake" as here defined includes both large and small bodies of water ... a lake is distinguished from a stream by the fact that in the former the body of water is substantially at rest while in the latter it has a perceptible flow ... To constitute a lake, a body of water must have a reasonably permanent existence. Many lakes have a permanent body of water. But the body of water need not be permanent in order to constitute a lake. Thus, a body of water which occasionally dries up in periods of drought is still a lake. On the other hand bodies of water, even though of considerable size, which collect only in times of heavy rain, flood or melting snow, and which soon dry up, are not lakes within the meaning of that term as here defined.

It would appear that, in the United States, a distinction is made when defining "lake" between water that is flowing and water that is substantially at rest. However, in *Libby, McNeil & Libby v. Roberts* (1959), 110 So. (2d) 82 (Fla. C.A.), it was held that the existence or nonexistence of a current and the size and depth of a body of water do not always determine whether it is a lake or a stream."

Alberta legislation and regulations do not define a "lake", although lakes are considered water bodies and their beds and shores are considered "watercourses" in the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c.E-12:

1(yyy) “watercourse” means

- (i) the bed and shore of a river, stream, lake, creek, lagoon, swamp, marsh or other natural body of water, or
- (ii) a canal, ditch, reservoir or other artificial surface feature made by humans, whether it contains or conveys water continuously or intermittently.

Other than the *Alberta v. Very* case, Alberta courts have not defined a “lake.” I found some helpful defining characteristics, such as that lakes are bodies of water surrounded by land, with water depths greater than 2 metres”, and this distinction:

“Lentic” is a term applied to lakes because the waters of these aquatic systems are standing or still, relative to rivers (“lotic” systems).”

The *Public Lands Act* uses the term body of water rather than water body. The *Municipal Government Act* uses the term body of water in section 60 and in the *Subdivision and Development Regulation* for the purpose of requiring applicants to provide information in their plans about beds and shores, and for the purpose of circulation for comments from AESRD if the beds and shores are owned by the Province, and the term Water Bodies in the heading of section 60. Water body is defined in the *Water Act* and a body of water means the same as a water body according to rules of statutory interpretation.

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