

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Silver Elephant Mining Corp. v. Andean
Precious Metals Corp.*,
2026 BCCA 322

Date: 20260717
Docket: CA51484

Between:

Silver Elephant Mining Corp.

Appellant
(Claimant/Respondent by Counterclaim)

And

Andean Precious Metals Corp.

Respondent
(Respondent/Counter Claimant)

Before: The Honourable Justice Brundrett
(In Chambers)

On appeal from: A procedural order of an arbitral tribunal under the
Arbitration Act, S.B.C. 2020, c. 2, dated March 17, 2026
(*Silver Elephant Mining Corp. v. Andean Precious Metals Corp.*).

Oral Reasons for Judgment

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Place and Date of Hearing:

Vancouver, British Columbia
July 10, 2026

Place and Date of Judgment:

Vancouver, British Columbia
July 17, 2026

Summary:

After arbitrating various claims and counterclaims between the parties related to the sale of minerals, an arbitrator directed that each party bear their own costs. The appellant applied for reconsideration of the costs award, asserting that it did not properly reflect its success. The arbitrator dismissed the application, finding that she was functus officio. The appellant applies for leave to appeal on the question of whether the arbitrator lacked jurisdiction to reconsider the costs issue. Held: Application dismissed. Although the appellant identified a question of law and brought itself within s. 59(4) of the Arbitration Act, it is not appropriate to grant leave. The language of the arbitration agreement indicated that such determinations were intended to be final, and the appeal lacked sufficient merit to warrant scrutiny by a division.

BRUNDRETT J.A.:**Overview**

[1] The appellant, Silver Elephant Mining Corp. (“Silver Elephant”), seeks leave to appeal pursuant to s. 59 of the *Arbitration Act*, S.B.C. 2020, c. 2, from the order of an arbitrator dismissing the appellant’s application for reconsideration of a costs award.

Background

[2] The proposed appeal arises from a contractual dispute between the parties related to the appellant’s mining project in Bolivia. The appellant is a mineral exploration stage company. The respondent, Andean Precious Metals Corp. (“Andean”), is a precious metals producer.

[3] The parties had a Master Services Agreement (“MSA”) and a purchase agreement (collectively, the “Transaction Agreements”) whereby the appellant agreed to sell up to 800,000 tonnes of oxide material to the respondent in return for three categories of payment: (1) operating expenses and other expenses; (2) consulting fees; and (3) additional consideration. The additional consideration was an additional cash payment of USD \$1 million pursuant to s. 3.3 of the MSA payable to the appellant if the spot price of silver exceeded a certain threshold. The condition for additional consideration was satisfied on December 18, 2024.

[4] On December 18, 2024, the appellant notified the respondent that the condition had been met and requested immediate payment of the additional consideration. The parties agreed that the condition in s. 3.3 of the MSA had been met, but the respondent refused to pay on the basis that the appellant was in default of its contractual obligations.

[5] On December 30, 2024, the appellant delivered to the respondent a notice of termination of the Transaction Agreements for non-payment of the additional consideration.

[6] On January 14, 2025, the appellant commenced arbitration under the MSA's arbitration provisions, seeking payment of USD \$1 million in additional consideration and pre-judgment interest accruing from December 18, 2024.

[7] The respondent brought a counterclaim alleging multiple breaches of the MSA, breach of honest and good-faith performance, a fundamental breach of the MSA, contract repudiation, and anticipatory breach. The respondent sought liquidated damages in excess of USD \$1.2 million and the return of its security deposit in the amount of USD \$860,451 paid to the appellant's subsidiaries.

Arbitration Decision

[8] There parties had a four-day hearing before arbitrator Tina M. Cicchetti in November 2025. On January 26, 2026, the arbitrator issued the Partial Final Award, with the quantum of costs to be determined at a subsequent hearing.

[9] The arbitrator considered the respondent's defences to the appellant's claim for additional consideration and found that none were made out. The arbitrator found that the facts did not support a finding of dishonest conduct or bad faith on the part of the appellant; there was no fundamental breach of the MSA; and the appellant neither repudiated the MSA nor committed an anticipatory breach. Accordingly, the arbitrator concluded that the appellant's termination notice was valid and that it was owed \$1 million in additional consideration as of December 18, 2024.

[10] Turning to the respondent's positive counterclaims, the arbitrator held that the respondent was not entitled to liquidated damages. However, the arbitrator found that the appellant owed the respondent a security deposit of \$274,553.55, payable as of January 29, 2025.

[11] With respect to interest, the arbitrator awarded pre-judgment interest to both parties. Interest was awarded for the additional consideration from December 18, 2024, and for the security deposit from January 29, 2025.

[12] Lastly, the arbitrator considered the issue of costs. She observed that both the *Arbitration Act*, S.B.C. 2020, c. 2 [*Arbitration Act*] and the MSA gave her the discretion to decide the issue of costs. The appellant submitted that if it succeeded in its claim for the additional consideration, it would be entitled to recover its costs on a full indemnity basis. The respondent also sought a full indemnity award but argued that in the alternative, each party should bear its own costs.

[13] The arbitrator identified reasons that weighed against awarding costs to the appellant. The arbitrator noted that: (1) the appellant had not achieved substantial success because the respondent had successfully established that it was owed a security deposit, although in a lesser amount than what they claimed; (2) the appellant's conduct had increased the respondent's costs in the arbitration; and (3) the appellant had unjustifiably retained the security deposit and unsuccessfully sought to prevent the respondent from reclaiming it, thereby increasing the respondent's legal fees.

[14] In light of the parties' divided success and the appellant's actions, the arbitrator ordered the parties to bear their own costs.

[15] Ultimately, the arbitrator issued the following orders, among others:

- a) the respondent is in breach of the MSA by failing to pay the additional consideration;

- b) the respondent must pay the appellant USD \$1 million for the additional consideration, plus pre-judgment interest compounded monthly from December 18, 2024, to the date of the award;
- c) the appellant must pay the respondent USD \$274,553.55 for the security deposit, plus pre-judgment interest compounded monthly from January 29, 2025, to the date of the award;
- d) each party must bear its own legal fees and expenses and equally bear the arbitrator's fees and expenses; and
- e) the arbitrator reserves jurisdiction to determine all matters relating to costs.

Reconsideration Application

[16] On February 10, 2026, the appellant applied for reconsideration of the costs award in the Partial Final Award on the basis that it had achieved substantial success and therefore was entitled to costs. Its position was that the arbitrator had erred in principle in finding that the parties had divided success. The respondent submitted that the determination of the costs award was final and that the arbitrator lacked jurisdiction to reconsider it.

[17] On March 17, 2026, by way of Procedural Order No. 3 (the "Procedural Order"), the arbitrator dismissed the application for reconsideration, as she found that the Partial Final Award was a final decision and that she did not have jurisdiction to reconsider the decision.

[18] The arbitrator found that the case law did not support that she had jurisdiction to modify the costs award. She referred to the general rule that an arbitral tribunal becomes *functus officio* on the issue of a final award, subject to exceptions in the *Arbitration Act*, the parties' arbitration agreement, or any rules of arbitration adopted by the parties. She observed that the *Arbitration Act* strictly limited a tribunal's power

to revisit an award to circumstances such as the correction of clerical mistakes, none of which applied in the present case.

[19] On April 14, 2026, the appellant filed a notice of appeal, alleging that the arbitrator had erred in law by finding that she was *functus officio* and had no jurisdiction to consider the appellant's application for reconsideration. On May 14, 2026, the appellant filed a notice of application seeking leave to appeal the Procedural Order pursuant to s. 59 of the *Arbitration Act*.

Legal Principles

[20] Section 59(3) of the *Arbitration Act* allows a party to an arbitration to seek leave to appeal to this Court on any question of law arising out of an arbitral award unless the arbitration agreement expressly states otherwise.

[21] Section 59(4) provides as follows:

(4) On an application for leave under subsection (3), a justice of the Court of Appeal may grant leave if the justice determines that

- (a) the importance of the result of the arbitration to the parties justifies the intervention of the court and the determination of the point of law may prevent a miscarriage of justice,
- (b) the point of law is of importance to some class or body of persons of which the applicant is a member, or
- (c) the point of law is of general or public importance.

[Emphasis added.]

[22] As this Court recently reiterated in *Green Light Solutions Corp. v. Kern BSG Management Ltd.*, 2025 BCCA 408 at para. 37, there are three requirements that must be met before leave can be granted to appeal an arbitration award:

- a) The appeal must be based on a question of law arising out of the award.
- b) The leave judge must be satisfied that one of the three circumstances identified in s. 59(4) of the *Arbitration Act* exists.
- c) The leave judge must be prepared to exercise the residual discretion implicit in the phrase "the Court of Appeal may grant leave".

[23] The threshold question is whether a question of law “can be clearly perceived and identified”: *Grewal v. Mann*, 2022 BCCA 30 at para. 32 [*Grewal*]. The judge must focus on whether the applicant has demonstrated an extricable question of law in the arbitrator’s analysis, and they are not to consider the substantive issue of the correctness of the arbitrator’s decision: *Grewal* at para. 32, citing *Richmont Mines Inc. v. Teck Resources Limited*, 2018 BCCA 452 at para. 61.

[24] Even where the applicant identifies an extricable question of law, the Court must consider whether the proposed appeal has sufficient merit to warrant scrutiny by a division: *A.L. Sims and Son Ltd. v. British Columbia (Transportation and Infrastructure)*, 2022 BCCA 440 at para. 83 (Chambers) [*A.L. Sims and Son*]. The points raised must be arguable, and there must be some prospect of success, bearing in mind the applicable standard of review: *A.L. Sims and Son* at para. 83.

Positions of the Parties

Appellant

[25] The appellant submits that the appeal is based on a question of law arising out of the Procedural Order: whether the arbitrator lacked jurisdiction to reconsider the costs award in light of the doctrine of *functus officio*. It submits that the appeal raises the legal issue of whether the doctrine of *functus officio* operates in the way that the arbitrator held.

[26] The appellant submits that all three circumstances set out in s. 59(4) are present. It argues that the outcome of the appeal is important to the parties, given the significant expenses incurred in enforcing their contractual rights. Second, refusing leave to appeal would cause injustice because there would be no appellate review of the arbitrator’s alleged failure to conduct the four-step inquiry set out in *Fotheringham v. Fotheringham*, 2001 BCSC 1321 at para. 46, to determine whether to award costs. Third, the question of whether an arbitrator has jurisdiction to reconsider her award is important to a large class, namely, all persons involved in arbitrations.

[27] The appellant submits that the proposed appeal has sufficient merit. It contends that because the appeal raises a question of law, the applicable standard of review is correctness. The appellant contends that the proposed appeal is arguable because there is no clear authority establishing that the doctrine of *functus officio* applies to arbitrators, who are privately contracted parties, and no rationale as to why arbitrators cannot reconsider their decisions while judges can.

Respondent

[28] The respondent opposes leave to appeal because: (1) the arbitration agreement prohibits the appeal; (2) the Procedural Order is not an “award”; and (3) the appellant has not satisfied any of the three requirements in s. 59(4).

[29] The respondent submits that s. 16.10 of the arbitration agreement in the MSA expressly prohibits an appeal. Section 16.10 provides as follows:

16.10 **Awards and Appeal.** There shall be no appeal from the determination of the Arbitrator to any court. Judgement upon any award rendered by the Arbitrator may be entered in any court having jurisdiction thereof.

[Emphasis added.]

[30] The respondent argues that the Procedural Order is not an “award” for the purposes of s. 59 of the *Arbitration Act*, which allows appeals on a question of law arising out of an arbitral award. It characterizes the Procedural Order as procedural in nature and not pertaining to substantive issues or rights.

[31] The respondent contends that none of the circumstances in s. 59(4) are present. The proposed appeal is of little importance to the parties because neither the costs award nor the Procedural Order exposes the parties to liability. Further, the respondent claims that this Court has repeatedly accepted that the doctrine of *functus officio* applies to arbitrators and that a privately appointed arbitral tribunal lacks the inherent jurisdiction necessary to reconsider a decision.

[32] The respondent submits that even if any of the circumstances in s. 59(4) were found to be present, it would not be in the interests of justice to exercise this Court’s

residual discretion to grant leave because it would be contrary to the principles of efficiency and finality.

Analysis

[33] Applying the framework above, I am first satisfied that the appellant has articulated a question of law arising from the Procedural Order. The appellant frames the ground of appeal in terms of a determination of whether the arbitrator lacked jurisdiction in light of the doctrine of *functus officio*. I agree with the appellant that a question of law can be perceived and identified.

[34] Second, I turn to the factors in s. 59(4) of the *Arbitration Act*. With respect to s. 59(4)(a), I am prepared to find that the question advanced is of importance to the parties. However, to satisfy s. 59(4)(a), it must also be shown that determination of the point of law may prevent a miscarriage of justice, which typically requires something far beyond the possibility that a different result might have been reached: see *1163499 B.C. Ltd. v. Yao*, 2025 BCCA 443 at para. 63, citing *National Home Warranty Group Inc. v. Red Rose Appliances & Plumbing Ltd.*, 2018 BCSC 234 at paras. 40–43; *Aquiline Resources Inc. et al. v. Wilson et al.*, 2005 BCSC 1461 at paras. 9–12. I confess to having difficulty here in characterizing the purported error as amounting to a miscarriage of justice. For instance, I would not find that the arbitrator’s failure to expressly refer to the analytical framework for costs amounts to a miscarriage of justice, given that her reasons indicate that she engaged in the substance of the requisite analysis.

[35] Regarding s. 59(4)(b), however, the appellant can satisfy the criterion if it raises a point of law of importance to some class or body of persons of which the applicant is a member. On this point, I accept the appellant’s submission that the question of whether the doctrine of *functus officio* applies to arbitrators is an important question to the class of persons engaged in arbitration proceedings. I therefore find that the appellant has satisfied the second branch of the test.

[36] Finally, I turn to whether I should exercise my residual discretion to grant leave. On this aspect, I take into account the prohibition on appeals in the

agreement. Under s. 59(3) of the Arbitration Act, a party cannot seek leave to appeal on a question of law if the arbitration agreement expressly states that the parties may not appeal any question of law arising out of an arbitral award. Section 16.10 of the arbitration agreement, which provides that “[t]here shall be no appeal from the determination of the Arbitrator to any court,” expressly prohibits appeals.

[37] The appellant submits that s. 16.10 is general and does not prohibit an appeal of a question of law. Nevertheless, I assess that a plain reading of the provision makes clear that no appeals for any error, including errors of law, are permitted: see *ENMAX Energy Corporation v. TransAlta Generation Partnership*, 2018 ABQB 142 at para. 20. The appellant referred to other provisions in the agreement that he submits support a relaxed interpretation of s. 16.10, but I find these provisions do not take away from the plain language on the prohibition of appeals from the arbitrator’s determinations.

[38] It appears to me from the agreement’s language that the parties intended that any order for costs would be final and within the arbitrator’s discretion. The appellant points out that the arbitrator may have misspoke in indicating that the appellant had not paid approximately \$274,553.55 that it admitted it owed. Still, the costs award itself is not the basis for the present appeal. The appellant has not appealed the underlying costs award. As such, this potential error does not overcome the challenges to the appellant’s ability to establish a right to have a private arbitrator reconsider their decision.

[39] Another challenge to the application for leave is the doubtful merits of an appeal examining when and to what extent the doctrine of *functus officio* applies in the arbitration context. The appellant submits that there is no clear authority establishing that the doctrine applies to private arbitrators. Yet, the respondent has referred me to authorities from this Court where the doctrine of *functus officio* has been applied to arbitrators: see *Bollhorn v. Lakehouse Custom Homes Ltd.*, 2024 BCCA 192 at paras. 33–34, leave to appeal to SCC ref’d, 2025 CanLII 297;

Westnav Container Services Ltd. v. Freeport Properties Ltd., 2010 BCCA 33 at paras. 28, 30, leave to appeal to SCC ref'd, 2010 CanLII 34807.

[40] The appellant submits that his argument draws support from the situation in which a judge may change their order before it is entered. However, it is well established that a court's ability to reconsider a matter prior to the entry of an order is derived from its inherent jurisdiction: see *Shewfelt v. Crawford*, [1997] B.C.J. No. 2868 (Q.L.), 1997 CanLII 3303 (B.C.C.A. Chambers) at para. 5. Such inherent jurisdiction should only be exercised in extraordinary, compelling and exceptional circumstances where justice manifestly so requires: *MacQueen v. Canada (Attorney General)*, 2014 NSCA 73 at para. 28, leave to appeal to SCC ref'd, 2015 CanLII 1219.

[41] The analogy to a trial judge's ability to reconsider their decision does not appear to be apt in these circumstances. The basis of the superior courts' inherent jurisdiction is not from any statute or rule of law, but from their very nature: *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, 1995 CanLII 57 (SCC) at paras. 29–30.

[42] A comparison with administrative tribunals may be more appropriate. Unlike the Superior Court, it is an accepted legal principle that administrative tribunals have no inherent jurisdiction to reconsider a decision once it has been made and that such authority must be found in statute: *Watson v. Alberta (Workers' Compensation Board)*, 2011 ABCA 127 at para. 22. Similarly, arbitral tribunals lack inherent jurisdiction: *Premium Brands Operating GP Inc. v. Turner Distribution Systems Ltd.*, 2011 BCCA 75 at para. 1. I was referred to no authority supporting the arbitrator's inherent jurisdiction to reconsider a costs award, a power that courts are cautioned to use sparingly and only in exceptional circumstances.

[43] Taking the above considerations into account, I assess that the proposed appeal does not appear to have sufficient merit on the question of law proposed to warrant scrutiny by a division.

Disposition

[44] I would dismiss the application for leave to appeal.

“The Honourable Justice Brundrett”