Seizing opportunity in the Canadian M&A market amid cross-border trade policy uncertainty

April 10, 2026

Despite early optimism, 2025 was a mixed year for Canadian M&A. The aggregate value of deals rose by over 70 per cent to approximately C$530 billion between 2024 and 2025. However, the overall number of deals dropped around 8 per cent, from 2,673 deals in 2024 to 2,454 deals in 2025.[1] A key constraint facing the M&A market, and one that persists in the early part of 2026, is the uncertain outlook for the Canada-U.S. trade relationship. The U.S. administration's position on the future of the Canada-U.S.-Mexico Agreement (CUSMA) remains unclear. The U.S. currently has a range of sector-specific tariffs in place, including 10 per cent on most non-CUSMA products, 50 per cent on steel and aluminum, 50 per cent on copper, 25 per cent on autos, 10 per cent on non-CUSMA compliant potash and energy products, and 35 per cent on softwood lumber. There is a looming possibility that these tariffs could be increased or that new trade policy changes could result in negative impacts on additional industries. M&A success in this environment requires Canadian businesses and their counsel to place increased emphasis on trade-related considerations during the dealmaking process.

This article outlines key processes and deal terms that should be top of mind when negotiating M&A deals in the current environment.

Key takeaways

- Canadian M&A deal value surged 70 per cent to C$530 billion in 2025, while deal volume declined 8 per cent to 2,454 deals.
- U.S. tariffs ranging from 10 to 50 per cent across multiple sectors and ongoing CUSMA uncertainty now demand heightened focus on cross-border exposure throughout the deal lifecycle
- Buyers need forensic analysis of targets' supplier networks, customer dependencies, country of origin compliance, and contractual mechanisms for absorbing trade-related cost shocks
- Parties must explicitly define whether trade policy changes constitute material adverse change, including objective criteria for "material," duration requirements, and alignment with interim operating covenants to avoid inadvertent breaches

- Three emerging mechanisms shield deal value beyond closing: trade impact indemnities for unquantifiable risks, earnouts that defer payment until trade uncertainty resolves, and minority equity retentions that align vendor interests with post-closing performance
- Success hinges on thoughtfully negotiating who bears trade policy risk at each deal stage, from signing through post-closing integration, rather than accepting standard boilerplate provisions

Due diligence

In the current environment, purchasers and their counsel conducting due diligence should have a heightened focus on the target's exposure to trade policy risk, including a thorough assessment of the target's suppliers, customers, and business partners, and an assessment of their compliance with the applicable country of origin laws. Particular attention should be paid to whether these parties are located, or have relevant operations, in jurisdictions where shocks from changes to trade policy are likely. Such changes – including new tariffs, non-tariff barriers, or the termination of a free trade agreement – may materially impact the target's economics and the overall deal value.

Purchasers and their counsel should also review the target's key contracts for provisions that address changes to the parties' rights and obligations in the case of impacts from trade policy changes, including whether such provisions result in renegotiation and/or termination rights and, if so, the threshold for triggering such rights. They should also determine whether there are mechanisms in the contracts allocating any increased costs resulting from policy changes, which party bears the burden of the increased costs, whether there is a limit on the extent of their liability, or whether the terms may be renegotiated.

Deal protections

Representations and warranties

Purchasers should insist that vendors include representations and warranties regarding the target's key contracts in the purchase agreement and ensure that they are indemnified for any inaccuracies. Purchasers' counsel should be attentive to whether the representations are qualified, and if so, the nature of the qualification (e.g., knowledge, materiality, and scope). In a purchase agreement with an interim period between signing and closing, it is a common closing condition to include a bring-down of the representations and warranties, which requires vendors to certify that the representations and warranties remain true and accurate at the time of closing. Here as well, purchasers' counsel should be attentive to any further qualifications, particularly where such qualifications in the bring-down certification are in addition to a qualified representation or warranty. To the extent that trade policy changes during the interim period render any particular representation and warranty inaccurate, then vendors may be unable to satisfy the bring-down condition and purchasers may be able to walk away from the deal.

Interim operating covenants

An interim operating covenant governs how the target must be operated between signing and closing.[2] It typically imposes a general obligation on the target to operate in the ordinary course, along with specified obligations (such as preserving business relationships) and prohibitions (such as selling or transferring assets above a threshold). The purpose of the interim operating covenant is twofold: first, to ensure that the business the purchaser bargained for at signing is essentially the same as the business it acquires at closing; and second, to minimize the moral hazard of the vendor acting in its own interest at the purchaser's expense during the interim period. Interim operating covenants are relevant in the context of unforeseen trade policy changes because such changes may prompt the target to take mitigating steps (such as cutting production, terminating employees, changing suppliers, or ending customer contracts) that may be a breach of the interim operating covenant.

Canadian courts have generally accepted that reasonable, temporary measures taken in response to external shocks do not constitute a breach.[3] However, these decisions have been highly fact specific. It is therefore important to recognize the inherent tension between purchasers (who typically want a narrower scope of permitted actions) and vendors (who tend to want greater operational flexibility) and to negotiate the scope of the covenant accordingly. The parties may also consider requiring the vendor to obtain the purchaser's consent before taking measures in response to trade policy changes that fall outside the negotiated scope of the covenant. Thoughtfully managing the tension created by divergent priorities of purchasers and vendors is essential to achieving an informed and balanced allocation of risk for trade policy changes during the interim period.

Material adverse change clauses

A material adverse change (MAC) clause is a common closing condition. It enables the purchaser to walk away from the deal if there has been a MAC in the interim period between signing and closing. In *Fairstone*, the court defined a MAC as "an unknown event that substantially threatens the overall earnings potential of the target in a durationally-significant manner."[4] Typically, the MAC clause will include a carve out whereby certain events are excluded from the definition. The general practice is for the vendor to retain business-specific risks while the purchaser assumes systemic risks.[5]

When negotiating the MAC clause in the current environment, the parties need to determine whether impacts from changes to trade policy during the interim period will be allocated to the vendor (by including them in the general definition of a MAC), the purchaser (by carving them out), or whether trade risks will be shared through a tailored allocation. The parties also need to specify objective criteria for determining whether a change is "material" and "adverse," such as measurable financial or operational metrics, and include an explicit duration requirement to clarify how long a trade-related impact must persist before it constitutes a MAC. Finally, it is imperative to align the risk allocation between the MAC clause and the interim operating covenant, ensuring that systemic risks carved out from the MAC clause (such as trade policy changes) do not inadvertently reappear as breaches of the interim operating covenant.

Reverse break fees

A reverse break fee is a negotiated payment that the purchaser pays to the vendor in the event that the purchaser causes the transaction not to close. The fee is typically payable only where the reason for not closing is outside the vendor’s control (such as the purchaser failing to obtain financing or the requisite board or shareholder approvals, or the occurrence of a MAC). Where the purchaser is unable to close, the reverse break fee compensates the vendor for the lost time, expenses, and opportunity costs associated with the failed transaction. Vendors and their counsel should carefully consider the inclusion of a reverse break fee as a means of managing transactional risk arising from trade policy changes that prevent a deal from closing, along with the specific mechanics and the quantum of the fee.

Post-closing risk sharing

Given that cross-border trade uncertainty is likely to persist in the medium term, parties and their counsel should also be attentive to the risk of post-closing trade policy changes impacting the target.

Trade impact indemnities

A trade impact indemnity is a specialized indemnity under which the vendor agrees to compensate the purchaser for losses, costs, or liabilities incurred by the target as a result of post-closing trade policy changes. It provides a practical solution where the trade-related risk is potential and difficult to quantify at the time of signing the purchase agreement, such that a purchase price adjustment would be impractical. It also allows the parties to preserve their negotiated purchase price, while ensuring that the vendor receives full value for the target unless a trade policy change occurs which triggers the indemnity. Key considerations when drafting the indemnity include defining trigger events (such as new tariffs, duties, or sanctions), determining the scope of indemnification (including any exclusions), setting the duration of the indemnity, and establishing any baskets (whether a true deductible or tipping) or other limits on the quantum of indemnification.

Earnouts

An earnout is a provision that defers part of the purchase price until the post-closing period, making it contingent on the satisfaction of specific post-closing conditions. An earnout will often be based on financial metrics of the target for the post-closing period such as revenues, net profits, or operating cash flows, each of which could be impacted by trade policy changes that have a material impact on the business. Earnouts can therefore provide an additional mechanism for allocating this post-closing risk and require the purchaser to pay full value for the target business only if the success of the target business post-closing is not adversely affected by trade policy changes. Key considerations when drafting an earnout include defining clear earnout metrics, providing the vendor with clear information about the results of the target business relevant to the earnout metrics and audit rights, and tailoring the duration of the earnout to the time horizon in which the parties anticipate the trade risk to persist.

Minority equity retentions

A minority equity retention requires the vendor and/or certain key employees of the target to retain an equity interest in the target business post-closing. This can reduce the purchaser’s exposure to any post-closing trade policy changes by sharing the downside (and the upside) of the target business with the vendor and other key employees. Where vendors or certain key employees remain in senior management positions and hold an equity interest at the target business post-closing, it incentivizes them to navigate post-closing trade policy changes in a manner consistent with the interests of the purchaser as a shareholder. A minority equity interest can be structured as an equity rollover where the vendor reinvests a portion of their proceeds into the purchaser or a new entity created to hold the target business. It can also be structured so the vendor simply retains a minority equity stake in the target business post-closing. In any minority equity retention, the parties and their counsel should consider the rights and obligations of the parties as shareholders of the target business post-closing, including entering into shareholder agreements containing negotiated buy/sell rights which may be exercisable by the purchaser to acquire the target's shares from the vendor and the key employees after a negotiated period in which no adverse trade policy changes have occurred.

Takeaway

Addressing trade policy risk in Canadian M&A transactions is critical to minimizing uncertainty and preserving deal value. By incorporating robust due diligence, tailored purchase agreement provisions, and appropriate post-closing mechanisms, parties can effectively mitigate these risks and safeguard their strategic objectives.

For more information on cross-border trade policy, successfully conducting M&A in the current environment, or any of the other topics referenced in this article, please reach out to any of our authors below or your usual BLG contact.

This article was prepared with the assistance of Deva Middleton, articling student.

Footnotes

[1] S&P Capital IQ (March 30, 2026). Data is for deal completed their respective years.

[2] *Cineplex Inc v Cineworld Group (Cineplex)*, 2021 ONSC at para 108.

[3] Ibid; *Fairstone Financial Holdings Inc. v Duo Bank of Canada (Fairstone)*, 2020 ONSC.

[4] *Supra note 3 (Fairstone)*.

[5] *Supra note 2* at para 106.

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