

Expert Analysis

A bird's chirp: Donald Trump's most recent Canadian tariff

By **Robert McCullough** · [Listen to article](#)

Law360 Canada (July 30, 2026, 11:36 AM EDT) -- George Santayana's famous *bon mot* "Those who cannot remember the past are condemned to repeat it" is part of a longer passage that is particularly relevant to President Donald Trump's bizarre conclusion that bad forestry practices in Manitoba should be met with a 50 per cent tariff on Canadian exports to the U.S., to be paid primarily by American importers and consumers.

He has reached back to an infamous period in the 1930s when the United States inadvertently declared a tariff war with the rest of the world. To the everlasting shame of President Herbert Hoover, the *Smoot-Hawley Tariff Act* was signed on June 17, 1930. The tariffs and their repercussions were a principal cause of the Great Depression. Donald Trump obviously missed this part of U.S. history, not having been born until June 14, 1946.

The complete passage in which Santayana's aphorism is found is less well known. He concludes his comment on historical repetition as follows:

Thus old age is as forgetful as youth, and more incorrigible; it displays the same inattentiveness to conditions; its memory becomes self-repeating and degenerates into an instinctive reaction, like a bird's chirp (*The Life of Reason: The Phases of Human Progress*, Volume I, George Santayana, 1905, page 285).



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As with his previous venture into catastrophic tariff policy, Trump's latest innovations in restraint of free trade are most likely doomed to rejection by the U.S. Supreme Court. Trump's long-suffering legal staff have reached back to 1930 and found an implausibly poorly written authority in s. 338:

19 U.S. Code § 1338 - Discrimination by foreign countries

(a) **ADDITIONAL DUTIES** — The President when he finds that the public interest will be served thereby shall by proclamation specify and declare new or additional duties as hereinafter provided upon articles wholly or in part the growth or product of, or imported in a vessel of, any foreign country whenever he shall find as a fact that such country—

(1) Imposes, directly or indirectly, upon the disposition in or transportation in transit through or reexportation from such country of any article wholly or in part the growth or product of the United States any unreasonable charge, exaction, regulation, or limitation which is not equally enforced upon the like articles of every foreign country; or

(2) Discriminates in fact against the commerce of the United States, directly or indirectly, by law or administrative regulation or practice, by or in respect to any customs, tonnage, or port duty, fee, charge, exaction, classification, regulation, condition, restriction, or prohibition, in such manner as to place the commerce of the United States at a disadvantage compared with the commerce of any foreign country.

His [fact sheet](#) clearly states his case:

Today, President Donald J. Trump signed three Proclamations pursuant to Section 338 of the *Tariff Act* of 1930 to impose additional 50% tariffs on certain goods of Canada in response to Canada's discriminatory treatment of American products. By doing so, President Trump is offsetting the burden and disadvantage on U.S. commerce from Canada's discriminatory treatment of U.S. commerce and is leveling the playing field for crucial American exports — cars, alcohol, and dairy.

This is quite a chirp.

His proclamation doesn't mention subsection (g) however:

(g) ASCERTAINMENT BY COMMISSION OF DISCRIMINATIONS — It shall be the duty of the commission to ascertain and at all times to be informed whether any of the discriminations against the commerce of the United States enumerated in subdivisions (a), (b), and (e) of this section are practiced by any country; and if and when such discriminatory acts are disclosed, it shall be the duty of the commission to bring the matter to the attention of the President, together with recommendations.

Absent subsection (g), Trump's proclamations would empower him to cherry-pick the facts of such "discriminations against the commerce of the United States" and allow him to penalize trade with any foreign country he chooses, without evidence or analysis. With subsection (g) the International Trade Commission is assigned the duty to find such problems and bring them to the president.

Obviously, the link between wildfires — which apparently do not take place in the U.S. — and s. 338 is pretty [tenuous](#):

We are holding Canada responsible for the fact that they are not properly maintaining their Forests, and Brush therein, and the United States is being unnecessarily invaded by filthy, polluted, and unhealthy air, the quality of which is dangerous, and totally unacceptable! I will call the Prime Minister during the day to find out what they are going to do about it. The cost is incalculable! Canada has refused to engage in basic Forest Management and Debris Removal, knowing that such refusal will lead to exactly this result. This is Willful Negligence, and becoming a yearly occurrence, costing the United States Billions of Dollars, which cost of this pollution must of necessity be added to the TARIFFS Canada is currently paying. Thank you for your attention to this matter!

President DONALD J. TRUMP

Clearly, Trump did not read the Supreme Court’s decision to block his previous attempt to exert unilateral power to set tariffs:

We are therefore skeptical that in IEEPA — and IEEPA alone — Congress hid a delegation of its birth-right power to tax within the quotidian power to “regulate” (*Learning Res., Inc. v. Trump*, 607 U.S. 229).

For those who do not use the word “quotidian” in mundane everyday life, it isn’t too surprising to find that it is an adjective meaning everyday and mundane. If one is a Supreme Court justice, use of the word “quotidian” is probably very quotidian indeed.

Use of the *International Emergency Economic Powers Act* (IEEPA) to evade the clear wording of the U.S. Constitution failed miserably earlier this year. Use of an even less convincing and entirely untested law for the same purpose is almost certainly destined to meet the same eventual fate.

The argument that Canadian retaliatory tariffs, adopted in response to illegal U.S. tariffs, must be punished with further tariffs based on an ambiguously drafted law from 1930 is tangled at best. At worst, it seems condemned to costly failure — costly not to Canada, but to the United States.

So what does the bird’s chirp actually mean to exporters in Canada and consumers in the United States? Legally, it would seem to waste another year as challenges make their way through the legal system to the Supreme Court.

The economics of the measure are no less questionable. The 50 per cent tariff applies to only a confusing subset of Canadian exports. Given its doubtful legal basis, it is unlikely to spur new production in the U.S. or change the purchasing habits of consumers of hockey sticks.

We haven’t seen a detailed analysis of the incidence of the dubious new tariffs, but Yale’s Budget Lab indicates that the proportion of import duties ultimately paid by U.S. firms and consumers is quite high.

[Tariff rates](#), end of 2026:

Average statutory rate: 11.8 per cent

Effective rate, pre-substitution: 10.9 per cent

Effective rate, post-substitution: 9.0 per cent

In sum, Trump's most recent chirp of instinctive reaction reaches back into the darkest period of United States trade policy, when a shortsighted U.S. Congress declared a trade war with the rest of the globe. The proclamation in triplicate pursuant to s. 338 is unlikely to survive legal challenge, and in the interim primarily injures the United States.

The best that can be said is that it bears out George Santayana's sagacious advice from the early days of the last century.

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