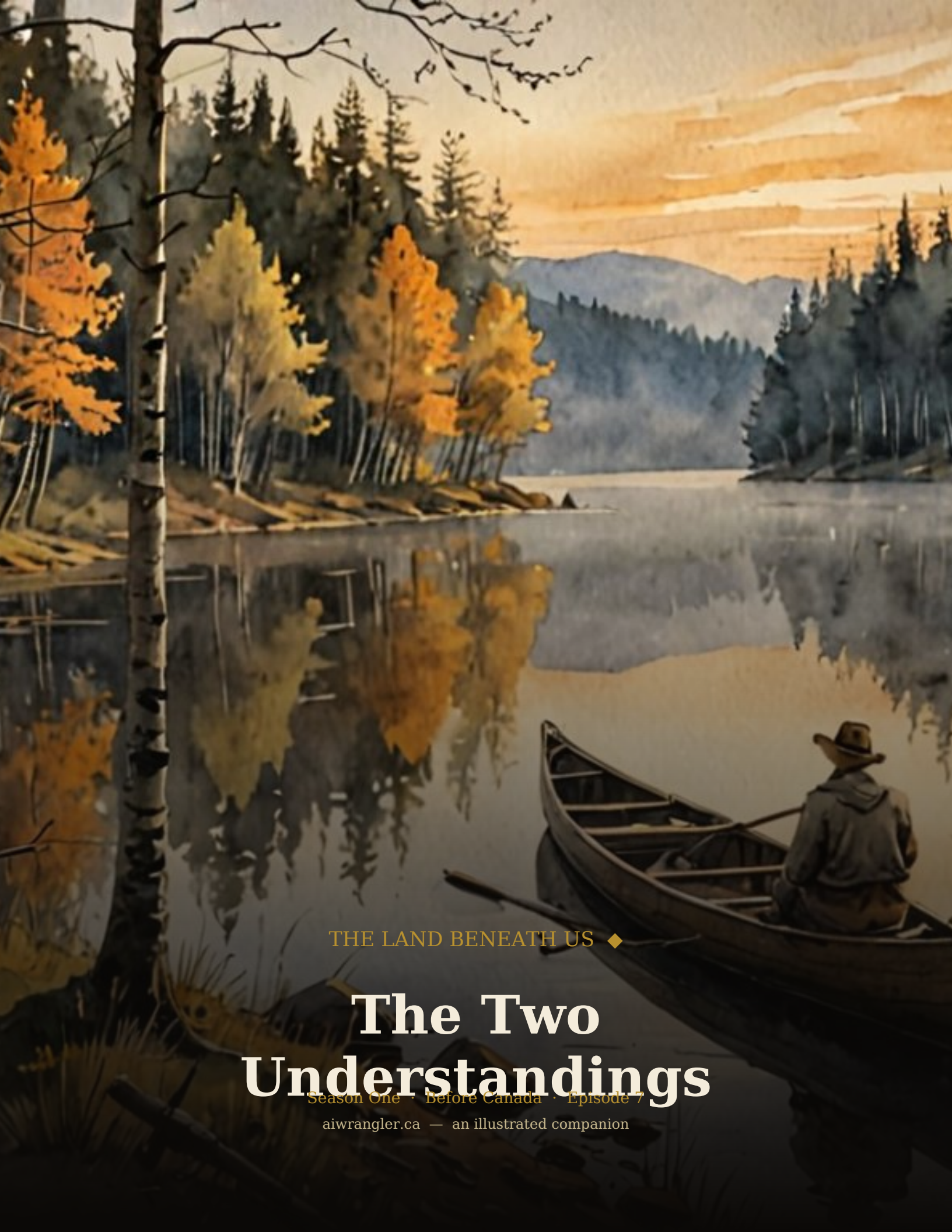




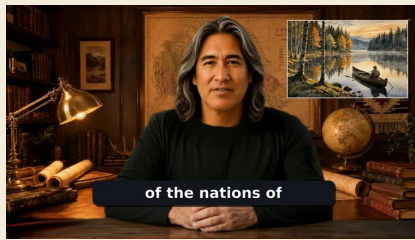
THE LAND BENEATH US ◆

The Two Understandings

Season One · Before Canada · Episode 7

aiwrangler.ca — an illustrated companion

Every date, term, and quotation in this series is drawn from the historical record. This companion is the full episode narration, illustrated.



From the episode

WILLOW BORN WITH A TOOTH

I'm at Library and Archives Canada in Ottawa, and I'm looking at an original treaty document — the kind of document that was signed, witnessed, and filed away to describe what had been agreed. And near the top of this one, as in treaty after treaty right across this country, there are four words that I want to read to you. Cede. Surrender. Release. Yield. Welcome to "The Land Beneath Us." Tonight we are asking the question that sits at the heart of this entire series: did the nations sell this land — or did they agree to share it?

SAM CARDINAL

Those four words — cede, surrender, release and yield up — come directly out of English property law, and in that tradition they carry a very precise, settled meaning. They mean that the previous holder has given up all claim, permanently, completely, and irrevocably. When a Crown lawyer wrote those words into a document, he understood them to describe a transaction that had already been completed — that legal title to the land had passed from one party to another, the way ownership of a house passes when you sign a deed. The sale was done. The land belonged to the Crown.



WILLOW BORN WITH A TOOTH

So one side read that document and heard a purchase. What did the other side hear?

SAM CARDINAL

To answer that honestly, you have to understand something about how most of the nations of this territory related to the land itself. In most Indigenous legal traditions across what we now call Canada, land was not property in the way English law understood property — it was not a thing a person could own the way you own a coat or a canoe. Land was closer to a relative: something you had obligations toward, something you belonged to as much as it could be said to belong to you. The idea of selling the land beneath your feet would have been as strange as the idea of selling the river, or the sky, or your own grandfather.



WILLOW BORN WITH A TOOTH

So when a Crown negotiator sat down at a table and said, we want to purchase this territory, what did the people across that table actually hear?

SAM CARDINAL

They heard an invitation into relationship. In the understandings that most nations brought to those negotiations, what was being proposed looked something like shared use — an agreement to live alongside one another, to extend the benefits of the land to newcomers, to set terms for coexistence between two peoples. That is not a small or casual thing. Inviting someone to share in the land is a profound act of generosity and trust in the traditions of most nations across this territory. But it is a fundamentally different act from a sale. When you begin a relationship, you do not walk away from the table having given something up. You walk away having started something.



WILLOW BORN WITH A TOOTH

And those two understandings would have looked identical on the day of signing — and completely opposite the morning the surveyors arrived.

SAM CARDINAL

Exactly right. From the Crown's point of view, once the treaty was signed, the transaction was finished — the land now belonged to the Crown, and settlers could come in, survey it, fence it, clear the trees to the horizon. From the nations' point of view, the treaty had opened a relationship that needed to be maintained and honoured — it created obligations on both sides that were meant to continue indefinitely. So when the surveys appeared, when the fences went up, when entire forests were cleared and the land was divided into neat rectangular lots, people who had been part of those negotiations looked at what was happening and simply could not understand it. Because in their understanding, none of that had been agreed to.



WILLOW BORN WITH A TOOTH

The gap isn't even about one side lying to the other, necessarily. It's about two completely different legal traditions sitting across the same table and not knowing they were speaking entirely different languages.

SAM CARDINAL

And the gap was built into the words themselves before the first negotiation ever began. Cede and surrender were terms of art with settled meanings in English law. There was no equivalent legal category — no corresponding concept — in most of the Indigenous legal traditions across this land. When interpreters tried to carry the terms of an agreement from one world into another, they were trying to translate not just language but entire frameworks for what land is and what an agreement means. Sometimes the closest available word was nowhere near close enough. And sometimes there was no close word at all.



WILLOW BORN WITH A TOOTH

What word, or what image, did the nations tend to use when they described what they believed they had agreed to?

SAM CARDINAL

The framing that comes through most consistently, in the oral traditions and in the accounts that were eventually written down, is one of sharing and coexistence — of making room, of allowing newcomers to live on the land and benefit from it while the nation retained its own connection and its own responsibilities to that land. The image is not of handing something over. It is of opening a door, and entering into a relationship that would now need to be maintained on both sides. The nations expected to go on living as they had lived, exercising their responsibilities to the land, alongside the newcomers — not displaced by them.



WILLOW BORN WITH A TOOTH

And that kinship framing — the idea that land is something you have obligations toward, not something you possess — that is the root of every disagreement that came after.

SAM CARDINAL

It is. Because the Crown's legal tradition included a concept called extinguishment of title — the idea that by signing a treaty, a nation permanently and completely gave up any legal relationship with the land. That concept did not exist in the agreements as the nations understood them. You cannot extinguish a relationship with the land any more than you can extinguish your relationship with your own family. You can neglect it, you can damage it, but the relationship and the responsibilities within it — those do not end. That is why you will hear elders speak of treaties as living agreements: not as a figure of speech, but as a precise legal description of what they understood themselves to have entered.



WILLOW BORN WITH A TOOTH

Now, there is one phrase that appears in the record of treaty negotiations again and again, on both sides of that table. And I want you to walk me through it, because I think it might be the most important phrase in this entire series.

SAM CARDINAL

As long as the sun shines, the grass grows, and the rivers flow. That phrase — or close versions of it — appears in the oral record and eventually in the written text of treaties right across this country. And it is one of the places where the two understandings meet most directly, and most heartbreakingly, because both sides used it, and both sides meant it sincerely. The Crown used it to mean: this transaction is permanent. This sale cannot be undone. As long as the earth stands, the title rests with the Crown. The nations used it to mean: this relationship is permanent. As long as the earth stands, we will live alongside one another under the terms we have made. Both sides were speaking of forever. They were describing entirely different forevers.



WILLOW BORN WITH A TOOTH

The same solemn promise, made in two completely different directions at the same moment.

SAM CARDINAL

And made in good faith on both sides — which is the thing that makes it essential to understand clearly. This is not a simple story of deception. It is a story of two legal traditions, two complete ways of understanding what land is and what an agreement means, meeting across a table with inadequate translation between them and very real pressure on both sides to reach terms. The Crown negotiators needed to show results to their governments. The nations needed to secure protection for their people. Agreements were made, and they were real agreements. But they were not the same agreement.



WILLOW BORN WITH A TOOTH

Three records, and a gap between all three of them. The written document. The Crown's reports. And what the nations remembered.

SAM CARDINAL

And the gap is not a small thing buried in the fine print. It is the central fact of almost every major land negotiation in the history of this country. The nations brought a legal tradition that did not recognize permanent alienation of land as a concept that could exist at all. The Crown brought a legal tradition that recognized almost nothing else. Those two traditions did not disagree about the terms of a specific deal. They disagreed about the nature of land itself. Whether the earth beneath your feet is the kind of thing a person can own. That is a profound disagreement, and it has never been fully resolved.

WILLOW BORN WITH A TOOTH

And the courts have been working through it for a very long time.

SAM CARDINAL

They have. And when you read the major land rights decisions of the last few decades, what you find is that Canadian law has moved — slowly, imperfectly, but genuinely — toward acknowledging that the nations' understanding of what was agreed matters, not just the written text. That the full context of a negotiation, including what the people at the table believed they were agreeing to, must be taken into account. Courts have called this the honour of the Crown — the principle that the Crown is bound not only by the words on the paper but by the full weight of what was understood and promised. That acknowledgement took a very long time to arrive at.

WILLOW BORN WITH A TOOTH

And the underlying question — the sale-or-sharing question — it isn't settled yet.

SAM CARDINAL

No, and I think it is important to say that plainly and not soften it. The gap we have been describing in this episode — between land as a commodity that can be sold and land as a relationship that can only be shared — is not a gap that closed when Canada became a country, or when specific claims were resolved in court, or when new agreements were signed. It is a living tension that remains present in the land itself, right now, today. Every land claim hearing, every negotiation over resource development, every conversation about what a specific treaty actually promised — they are all, in some measure, working through the same disagreement that existed on the first day. I'm Sam Cardinal.

WILLOW BORN WITH A TOOTH

And I'm Willow Born With A Tooth. That single gap — between sold and shared, between a transaction that ended and a relationship that was meant to last as long as the sun shines — is underneath every city block and farm field and highway in this country. The people who signed those agreements were not abstract figures in a history book. They were nations with legal traditions as old and as serious as anything the Crown brought to the table. And the question of what was really agreed, all those generations ago, is still being answered. We'll see you next time on "The Land Beneath Us."

Sources & Notes

The Land Beneath Us is built on the historical and documentary record. Where that record is contested, we say so.

A note on the record

The “cede, surrender, release and yield up” formula and the concept of extinguishment of title are drawn directly from English/Crown property law and appear in the written treaty texts; the argument that most Indigenous legal traditions had no equivalent category — that land could be shared but not permanently alienated — is well established in the scholarship and has been recognized, in part, by Canadian courts through doctrines such as the honour of the Crown and the requirement to consider what the parties actually understood. The “as long as the sun shines, the grass grows, and the rivers flow” formula appears in the numbered-treaty record (e.g., Treaty 6).

References & further reading

Haida Nation v. British Columbia (Minister of Forests), 2004 SCC 73, and Mikisew Cree First Nation v. Canada, 2005 SCC 69 — the “honour of the Crown” and the duty to consult.

R. v. Badger, [1996] 1 S.C.R. 771, and R. v. Marshall, [1999] 3 S.C.R. 456 — treaty interpretation must consider the understanding of the Indigenous parties, not only the written words.

Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010 — Aboriginal title and the weight of oral history.

The treaty language of cession (“cede, surrender, release and yield up”) and the “as long as the sun shines...” formula: the texts of the numbered treaties (Treaty 1-11), Crown-Indigenous Relations and Northern Affairs Canada.

On land as relationship rather than commodity: John Borrows, Canada’s Indigenous Constitution (University of Toronto Press, 2010).