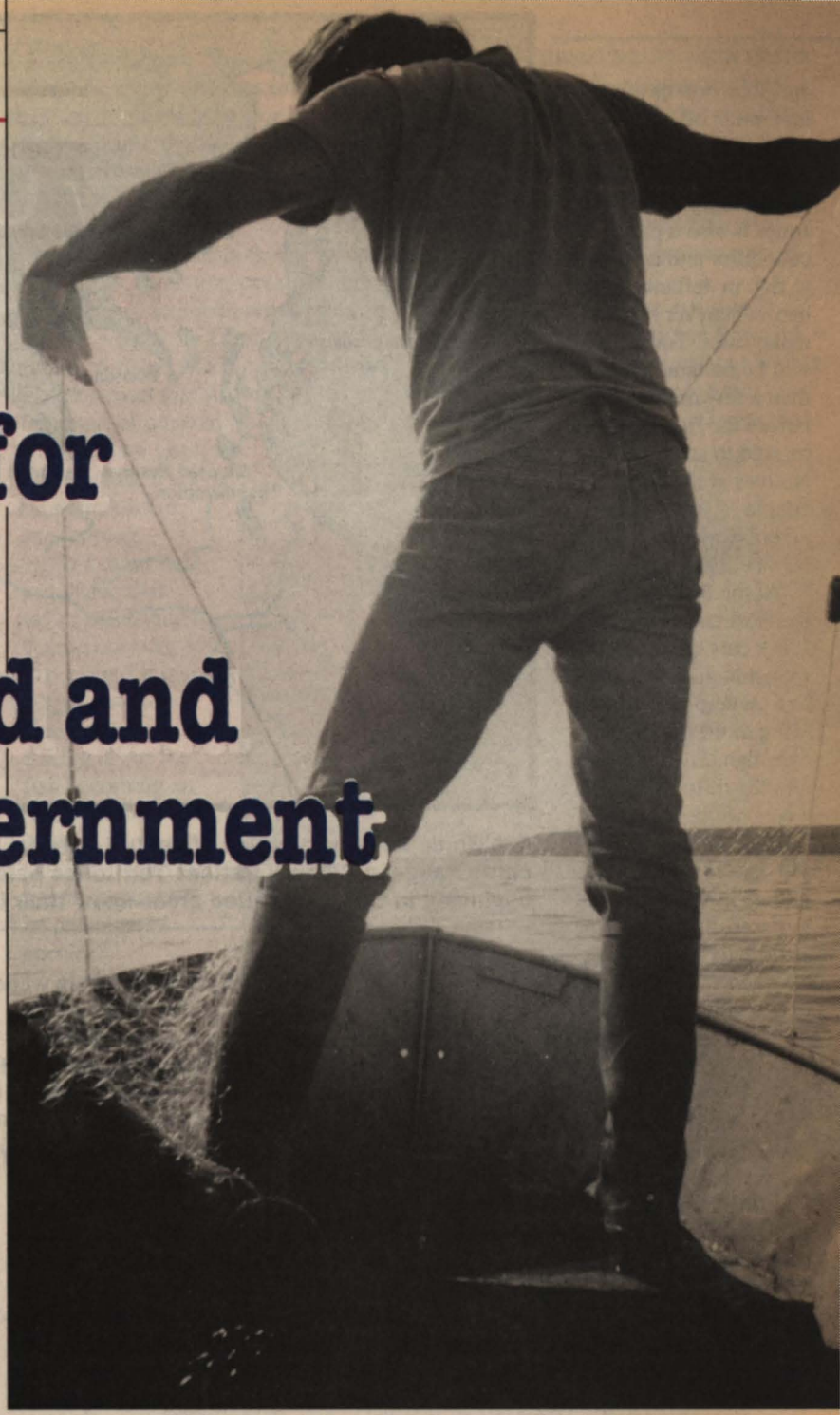
Casting for justice: fish, land and self-government

by Mike Milne



The concrete dock disappears into the rocky shoreline as we motor east along Colpoys Bay in the early morning sun. The 14-foot open steel boat cuts through the calm water, limestone bluffs tower from the forest behind us and two large wooded islands rise out of Georgian Bay to the south. I'm huddled in the bow while Ken Johnston and his five-year-old son Jeremiah sit quietly in the middle seat. Paul Jones, gripping the handle of an aging outboard motor, prays silently and drops tobacco over the waters.

We're heading out to check his nets, set the day before in 70 to 100 feet of water. Made of nylon fishing line, the nets are about three feet deep, with weights along the bottom and floats on the top, allowing the netting to float upright on the lake bottom.

Jones has invited me to see how the fishing is done at Cape Croker, near Wiarton, Ont. The Chippewas of Nawash (members of the Ojibway tribe) have been charged with overfishing, are defending their right to fish commercially, and also face a provincial ban on fish sales.

Many of the fishermen have been forced onto welfare, but more than immediate financial survival is at stake. The Chippewas of Nawash and Chippewas of Saugeen, a "sister" band with a reserve near Southampton, Ont. (who together make up the Saugeen Ojibway Nations Territories), are fighting to secure commercial fishing quotas that make sense, but also the right to control fishing in the area.

The Saugeen Ojibway want their right to self-government, in the area of fishing at least, recognized, and support has come from the United Church's national human rights officer, from Hamilton Conference, from Bruce Presbytery (there are United Churches in both the Saugeen and Nawash communities) and from area United Church ministers and lay people. The fight over fishing also brings Saugeen Ojibway land claims — now under negotiation — into sharper focus.

Both ironworkers by trade, Jones

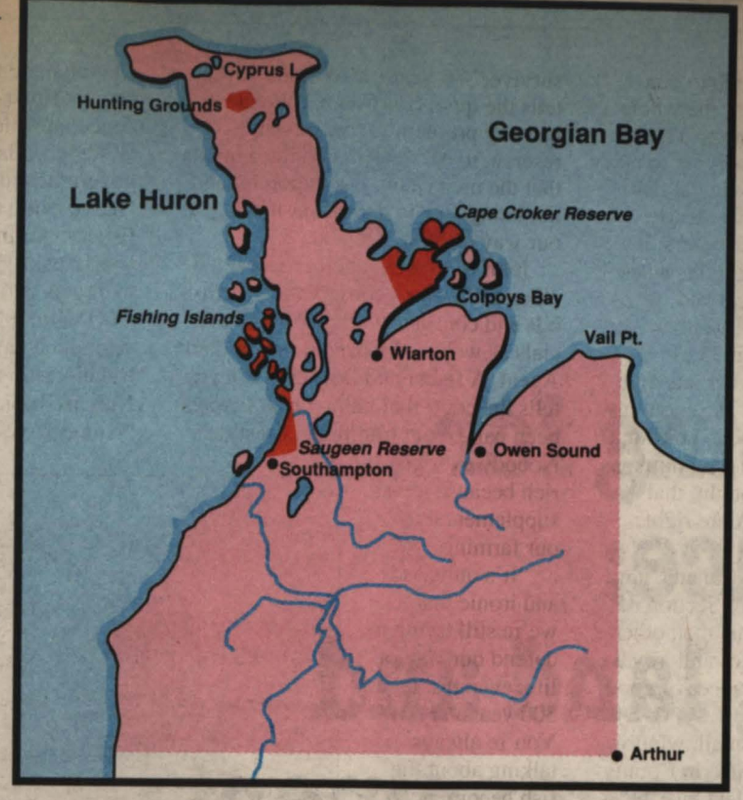
and Johnston haven't had much off-reserve work in the past couple of years, and have turned increasingly to fishing. Jones is also a band councillor and continues to fish in defiance of the ban, whenever he can make sales. Today, we will be on land no longer than a few minutes before the first fish will be sold to some visiting Natives at the dock; a couple of fish will be given away and I will buy a couple myself.

At the buoy marking the west end of the net, Jones cuts the motor and Johnston goes into the bow, where he begins to bring in the net, hand-over-hand. As we peer into the deep, clear water, we begin to see the fish coming in. Slowly the fish begin to pile up in the boat's bottom, mostly splake (an artificially planted cross between a lake trout and speckled trout) and a few whitefish.

There are 200 yards of net in total, two nets strung together end-to-end; pulling by hand, it takes about an hour and a half to remove the fish. Non-Native commercial tugs, on the other hand, might lay miles of gillnets, working from enclosed diesel-powered tugboats with advanced electronics and power winches. Jones and his 14 fellow Cape Croker fishers are limited by their small boats and lack of electronics: they can't venture far offshore safely, and can carry fewer nets and fish.

It's a good haul, close to 40 good-sized fish, unlike yesterday when they caught no fish, only a balled up net that had been lost in a storm, likely last spring.

As we head back to the dock I tell Jones he must have said a powerful prayer to have been blessed with a good catch. No, he chides me gently, he wasn't asking for a big catch today, but giving thanks for yesterday's catch, a $600 net that can be easily untangled and used again. Native people don't ask their Creator to provide for them, but give thanks for what is provided.



The Bruce Peninsula region of central Ontario. Pink area indicates Saugeen Ojibway Nations Territories before surrenders beginning in the 1800s. Red areas show their lands today.

Indians think differently from white people, Jones explains, tactfully. He tells me about the band's economic development committee which looked at the possibility of mining the bluff. "The people said, 'What, are you crazy? Why would we want to destroy all that natural beauty?' " Jones says. The community of 1,600 would not consider despoiling their land for a few fleeting dollars, for some temporary work.

I catch myself looking at the shoreline, seeing "waterfront property," valuable vacation land, doing rapid calculation of the shoreline's possible dollar worth, cut up into neat little squares. I feel a little guilty.

The question of guilt or innocence is usually sharpened in a courtroom where "The Crown" and "the accused," through polite, well-scrubbed agents, lay out and examine the details of possible misdeeds far from the scene of the disputed event. Today, though, I am in a courtroom that is not a courtroom, but the large, wood-panelled council chambers for the Chippewas of Nawash at Cape Croker, down a series of worn roads 21 km east of Wiarton.

There is a small mounted deer-head on one wall of the council room, a shelving unit crowded with sports trophies in one corner. On another wall, among certificates and mementoes marking important and heroic points in the band's life, are photos of the men who face fishing charges here today. They stand proudly for the camera.

As Judge David Fairgrieve of the Ontario Provincial Court, black gown and red sash, enters the room, all stand. Fairgrieve has the task of determining whether two men from Cape Croker, essentially representing all those Ojibway from the Saugeen and Nawash bands who fish, are guilty of fishing over a quota set by Ontario's Ministry of Natural Resources (MNR).

The trial is a pivotal point in a struggle that has been going on since 1984, when the MNR tried to set quotas on numbers of fish being caught by Cape Croker Natives using gillnets. With 12-15 Natives fishing, the splake catch was running at 40,000-60,000 pounds a year, when the MNR stepped in and set a splake quota of about 10,000 pounds. That left a dozen Natives sharing a fishery worth about $17,000, while a dozen non-Native fishers in the Lake Huron and Georgian Bay area shared a commercial fishery worth $1.5 million.

(No-one knows the exact value of the fish caught in the large sport fishery, but a recent 10-day fishing derby in Owen Sound had almost 20,000 pounds of fish registered; presumably much more was caught.)

Since 1984, the Chippewas of Nawash have signed their band fishing licence under protest, continued to fish up to and over the quota, and have been repeatedly charged with fishing violations. During 1989 and 1990, the MNR ran a "sting" operation against the Nawash people, with undercover agents buying $12,000 worth of fish; the operation cost $140,000 to conduct. Finally, last summer, the whole mess seemed to be coming to a head.

The issue pits Natives trying to eke out a living against a provincial fish and game bureaucracy that clearly favors non-Native sports anglers; it pits aboriginal and treaty rights against some members of the local and provincial community who either don't know about Section 35 of Canada's Constitution (guaranteeing aboriginal rights, at least as set out in their treaties and agreements) or think it *shouldn't* exist, people who think, as their forebears likely thought, that Indians should have no more rights than anyone else.

Of course, Natives in Canada, until the 1982 Constitution and Section 35, have had a lot fewer rights than other Canadians, despite treaties and royal proclamations and assurances of good faith from the Crown.

For two weeks, in a small, windowless courtroom in the Dufferin County courthouse in Orangeville, Ont., the defence for the two Ojibway fishers had documented in painstaking detail, with evidence spanning at least 150 years, that the Saugeen Ojibway had never given up their fishing rights, had consistently tried to defend those rights, practised those rights and continue to do so. Over 400 documents, culled from band and National Archives, were read into evidence in Orangeville. But now, in an unusual turn, the court has come onto the Natives' territory, to hear evidence from community elders.

They tell how they fished for their own food and for sale, how fishing knowledge was passed from one generation to the next, how Natives practised simple but effective conservation methods (fertilizing fish eggs in buckets and returning them to breeding shoals) and how fish stocks have gone up and down over the past 50-60 years.

"I don't think the fishermen here depleted the stocks," says Fred Jones, now in his 70s. "But the commercial fishermen with their tugs . . . all these small lake trout and unsaleable fish were just dumped on shore." Jones also told how, during the '30s and '40s, commercial fish tugs "would set nets right around us and try to catch the fish before they got to us."

"I believe our Creator gave us that, the fish and the wild animals and the birds to eat, our Creator gave us that to survive," 70-year-old Winona Arriaga tells the quiet courtroom. "We never had any problem to live on our reserve, to eat the fish and the animals that the men catch. It's important and not being able to do it is destroying our way of life."

John Nadjiwon, another respected elder, talks about conservation methods and conflicts with provincial officials as well as the band's own Indian Agent. A fisher and farmer, Nadjiwon tells the court that fishing has "always been part of our traditional lifestyle. Nobody ever got rich because it was supplemental to our farming.

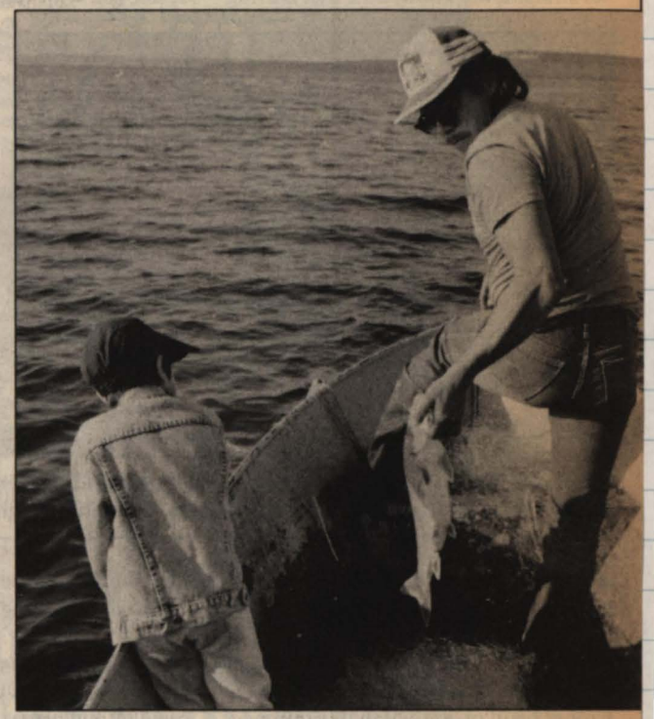
"It's quite sad and ironic that we're still trying to defend our way of life, even if it takes 500 years. . . . You're always talking about the fish becoming an endangered species. Well, what about the Native people becoming an endangered species?"

The court is also told about a fishing council formed by Nawash and Saugeen bands, designed to regulate and control the Native commercial fishery, about the group's strict regulation of net size, fishing protocol and conservation efforts. (The council is part of a larger organization that includes 10 Native bands from across Ontario, set up to encourage and regulate a Native commercial fishery.)

Like many Native encounters with Canadian justice, the court case is fraught with paradoxes and ironies. While the government of Ontario, through its prosecutor, continues to try to prove the Natives guilty of breaking provincial fish and game law, its own Ministry of Natural Resources steps up negotiations with the Saugeen Ojibway bands, attempting to negotiate a fishing agreement. The Natives' lawyer admits that her clients fished over their quota limit, but tries to make the case that the quota itself is illegal; a letter to former United Church national human rights staffer Glenys Huws, is introduced as evidence, in which MNR minister, Bud Wildman, admits that "The Ontario government does not contest the Native claim to an aboriginal right to a fishery, nor the Native claim to an aboriginal right to fish commercially."

It gets curiouser.

Ontario's NDP government last year signed a Statement of Political Relationship with the province's First Nations, basically agreeing that Natives have a right to self-government. But before seriously getting down to the business of negotiating a fishing agreement with the Saugeeen Ojibway, the MNR placed a virtual ban on fish sales, telling commercial buyers not to purchase Native fish. During the second week of the trial, it looked like a fishing agreement was close and the fish sale ban was lifted. A week later, with no agreement, the ban was on again.



Ken Johnston with son Jeremiah.

Naturally, much of this is no big surprise for the Ojibway, who have been faced with myriad ironies since first coming into contact with Europeans. With the recession pushing unemployment on the reserves to about 90 percent, the question of whether or not about a dozen families can make a decent living fishing is no laughing matter. But the Ojibway have

something wrong, something indecent? We visit that place, a clearly reserved graveyard, illegally sold and now the site of two gleaming new houses, later in the morning, and the Natives drum and sing, with even greater feeling, while the lots' new "owners" peer fearfully from behind closed curtains.

I am only a little relieved to know that at least some residents of the area, in 1903, did protest, one of them sending a letter through lawyers to the Indian Affairs Department of the time, reporting that the bodies of some of the 150 Natives buried at the site "had already been used in the manufacture of bricks. In other words, the bodies have become part of the soil and this soil is being used for the manufacture of bricks and no effort is being made whatever to protect any portion of the remains where the bodies are in this condition, and only where the bodies are well defined has anything in the nature of coffining been attempted."

The Indian Affairs Department did nothing and made no further protest five years ago, before the two houses were built on the site, sending an archeologist to inspect the lots, but still not informing the area Natives. Now, found out, they are hustling to make their excuses to the Natives, to try to persuade the homeowners to sell, to expropriate if necessary.

So, the Ojibway, still being denied the right to earn a traditional living through fishing, must absorb the horror of knowing the bones of their ancestors were literally made into bricks, to build homes for the settlers who pushed them out.

And yet I am asked to join the circle.

I can only say *megwitch*, thank-you, as we go around the circle greeting one another, and place my tobacco into the fire with a prayer for the souls of those whose final resting place has been disturbed, and for my own guilty soul and those of my ancestors.

As a Canadian child, one of my first educational encounters with Native history came through the story about Manhattan Island (worth billions as downtown New York real estate), bought by the Dutch West Indian Company in 1626, from Manhattan Indians, for trinkets worth $24.

As all white kids know, land is real estate, something which is bought and sold. And as we learned, those Dutch got a great deal. That sale, which set the basic scene for European dealings with Natives across North America, also slyly taught me and plenty of others like me that Indians weren't very smart. Europeans came to this land, took it by force or bought the real estate at a good (cheap) price.

Richard Kahgee, currently chief of the Chippewas of Saugeen, has another view of history. "Our perspective is that . . . we gave up land with the understanding that we were sharing what we had with people that needed land. And in our history, you have never seen a country so gracious to take in so many immigrants and give so much."

Kahgee feels that the freedom and democracy inherent in Native society was a threat to the structured, authoritarian European society that was being transplanted in America. "So the only way that the governments could deal with it was to kill it. In the Americas you see cultural genocide, but Canadian history has been more insidious than that. It has been a long process of systemic discrimination — (Native) economic, social, political structures have all been dismantled, languages were attacked, everybody's been a party to that." The United Church has recognized and apologized for its own participation in that endeavor.

Unlike the Manhattans, Kahgee's ancestors saw the runaway train of cultural and economic expansionism coming. They may not have known about the Manhattan deal, but they saw how deals were made, and broken, with other Natives further south, as European settlement headed north in the 19th century.

The Saugeen Ojibway controlled about two million acres by the time settlers were filling in southern Ontario and began to look north in the 1830s (see map). In the half-century between 1836 and 1886, the Saugeen Ojibway went through six major treaties that progressively pushed them, first north onto the Bruce Peninsula, then onto their current reserves — the Chippewas of Nawash to about 6,000 acres on Cape Croker, a remote point of land jutting east of the peninsula into Georgian Bay, and the Chippewas of Saugeen to a small amount of fertile farmland and a lot of infertile sandy beachfront, north of Southampton, Ont., a small hunting ground in the north of the peninsula and a few selected burial grounds.

The treaties had the appearance of legitimacy, but often didn't even meet the British Crown's own rules as set out in the Royal Proclamation of 1763. The 1836 deal, for example, which saw the Natives hand over two million acres in the south of its territory, the

Fishing rights issue sharpens Saugeen land-claim questions.

rich farmland in much of what are now Grey and Bruce counties, was made at a meeting not specifically arranged for land surrender. The deal was also made with Upper Canada Lieutenant Governor Sir Francis Bond Head, who had earlier pressured the Saugeen Ojibway to move right out of their traditional lands, to Manitoulin Island, where he wanted to create a huge Native reserve, much like the modern-day "Black homelands" of South Africa. The Natives refused to move to Manitoulin, but Bond Head wouldn't prevent white encroachment and undoubtedly the Natives felt threatened. Subsequent treaties left the Ojibway with smaller and smaller tracts of land. Essentially, if settlers wanted Native land or resources, they got them, either through treaties or by squatting or stealing.

The hard truth is that the Ojibway almost always made deals under duress and the Crown seemingly reneged on the deals only to forge "new" treaties, which were in their turn ignored or broken. Even those deals that weren't papered over with subsequent treaties were badly mishandled. And once the Natives were on the reserves, relegated to the legal status of minors, forced to deal with Ottawa through politically appointed, often corrupt Indian agents, unable for many years even to hire their own band lawyers, they were further abused. The trust funds set up supposedly for their use were used more often to further the ends of settlers. Native businesses were either refused funding or inadequately funded, ensuring failure.

Darlene Johnston, a member of the Chippewas of Nawash band, who grew up off the reserve but always visited and kept close contact with her family there, was a student of her own history. But she realized that study could only go so far and then legal action would have to take over. Currently an assistant law professor at the University of Ottawa, on a year's leave of absence, she did much of the archival research for the fishing trial and co-ordinating the legal aspects of land claims.

The Saugeen Ojibway are currently involved in four separate areas. There are negotiations with the federal and provincial governments, on land still unsold from the 1854 surrender. The Chippewas are claiming the 66-foot shoreline allowance around the Bruce Peninsula, road allowances, river and lake beds and remaining Crown land, some of which has been transferred to national parks authorities. Then there are the court cases (each dealing with only a "sampling" of broken deals) with three cases each being contested in both federal and provincial court suits:

- ☐ one set of actions, relating to management of trust funds from land sales, specifically questioning "loans" to institutions such as Osgoode Hall law school in Toronto and McGill University in Montreal, which hadn't been repaid;
- ☐ another case trying to decide whether the federal or provincial government takes responsibility;
- ☐ and a case involving unsold land, where people have been using the land without authorization or payment.

"References to squatters are going to make people nervous around here," Johnston tells me during a break in the many meetings she attends, helping the Nawash and Saugeen bands find their way through the various legal quagmires. Saying some of the land is "being encroached upon" or "subject to unauthorized use" is less explosive terminology. Besides, the Natives are not suing individuals, but governments which made commitments to take care of the Natives' affairs and best represent their interests.

Natives have good reason for distrusting the Canadian legal system. "Unfortunately, before aboriginal rights were recognized in the Constitution, the law was being used to take away our rights," says Johnston. "So Native people generally have a very negative view of the Canadian legal system, since it's been used as an instrument of oppression rather than protection. Before 1982, the government could break treaties and breach rights and as long as it was acting in its own jurisdiction and not provincial jurisdiction it could do what it liked."

Rev. David Maxwell buys "illegal" fish from Marshall Nadjiwon.

Even now, there is pressure for the Natives to wrap up the land claims research, to accept government research funding, but with a deadline. The longer the research continues, the more ammunition Natives acquire for their fight for redress.

For Johnston, the hardest part of the work has been confronting her own family and community history, coming face-to-face with a lot of unpleasantness. It was she who found the evidence about the desecration of the Native burial ground in Owen Sound. But despite the abuses and broken promises, the community has survived relatively intact, so "it's not all backward-looking, it's forward-looking too."

There's more than a whiff of what political scientists call *force majeure* about the MNR's use of a ban on fishing to force an agreement.

About 100 people pack the church hall at Central United in Lion's Head, Ont., in mid-August, as summer wears on, the fishing ban still in place and negotiations stalled. The forum, nominally organized by the Bruce Peninsula Ministerial Asociation, gives the Natives, sport fishers, commercial fishers and the MNR a chance to air their positions.

Mel Crystal, a lawyer and the MNR's co-ordinator of Native policy, seems confident that a fishing agreement will be reached with the Saugeen Ojibway. But until that agreement is reached, fish sales may be illegal and a ban on commercial sales remains.

He explains: "We recognize that First Nations are peoples who have an inherent right to govern themselves, and we recognize the governments of First Nations as legitimate governments and the relationship is of legitimate government to government. . . . The fishery is an important natural resource for these First Nations and I do believe in the not too distant future we will have an agreement between our two governments that recognizes the right and establishes mechanisms for the First Nations to exercise that within a system of self-government." It sounds positive, but as usual, there is a catch. The province wants to negotiate, but only on its terms. And until the ban is lifted the Chippewas refuse to continue negotiating.

Despite all their talk about self-government, in practice non-Native governments seem to have trouble with what may be the highest hurdle in the race to self-government — trust.

It's clearly apparent that many non-Natives lack trust, and reject both the notion of self-government and inherent rights. One angler (and United Church member) at the meeting is shocked that United Church ministers would "buy fish and encourage others to break the law," and besides, "the laws are made for everyone." Not far below the surface is the belief, the fear perhaps, that Natives will break their agreements, take too much for themselves, cut off everyone else. All the historic evidence, however, points in the other direction. The Natives continue to share freely, while the rest of us grab whatever we can.

To Nawash Chief Ralph Akiwenzie, a move toward self-government, based on fishing and coupled with resolution of land claims, simply makes sense: "As far as the Nawash and Saugeen are concerned, if we are going to have self-government, why not do it with something that we have always had, that we never lost and that we have today short of the ban? It should be an opportunity for the Ontario government as a concrete example."

There have been some beginnings, such as a "circle"-style approach to justice tried in recent months at Cape Croker. Instead of appearing in the relative anonymity of a provincial courtroom in Wiarton, offenders from the Nawash reserve have been facing trials before a judge, aided by Native Justice of the Peace Ted Johnston and a circle of community elders in the Cape Croker council chambers.

ROBERT COTTON PHOTO

Ron Ranville of The Pas, Man., does a hoopdance at the Four Winds Assembly, held at Cape Croker.

The experiment seems to be working, with the circle meting out solutions appropriate for the offender and the offended community. But self-government in the area of fishing also requires some trust from those non-Natives who fish for pleasure.

In many ways, the Natives don't want or need our approval for self-government. Their rights are inherent, Paul Jones explains to me; the Chippewas don't need anybody's permission to govern themselves.

Now, says Jones, they want to widen their influence. "We're actually stewards of the land and we want to have a say on the development, we want to have a say on the resources. How many millions of pounds of fish goes to the non-Native commerical fishermen, how many millions of pounds go to the non-Native anglers?"

There are powwows at both Saugeen and Cape Croker each summer, and every two years, the Four Winds Assembly is held at Cape Croker. Organized by the Saugeen Ojibway Nations and the local Aboriginal Rights Coalition, the gathering gives non-Natives a chance to gain some Native wisdom and knowledge.

The Assembly is also a distinctly Native attempt to build bridges with non-Native communities, and this year's guests included Manitoba Native MLA Elijah Harper, Catholic environmentalist Father Thomas Berry, a Toronto-based South African choir and a group from Zaire, along with Native elders, dancers and singers.

"With all these rights, all we're getting is the recognition from the predominant society that there is another society that exists, and has a right to survive and thrive and grow and that those rights are possibly different from the rest of the rights of what we call Canada," says Chief Kahgee.

The Mohawks were sworn enemies of the Chippewas in not-so-recent history, but Kahgee refers to a Mohawk tradition, the two-row wampum, as a signpost toward workable self-government. A kind of peace treaty, the two-row wampum was a beaded belt with a design consisting of two dark rows of beads on a light background.

The design indicates two nations, says Kahgee, the Europeans and the First Nations, symbolized by two canoes travelling down a river side-by-side.

"And you have your own canoe, you don't get in somebody else's canoe."