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Utrecht Revisited: The Origins of Fishing Rights in Newfoundland Waters*

J.K. HILLER

THE TREATY OF UTRECHT (1713), which ended the War of the Spanish Succession, has considerable significance for historians of Newfoundland. It established a clear British title to the whole island for the first time; and it awarded France coastal fishing rights on the Northern Peninsula and the northeast coast that were a source of controversy and resentment until 1904. In a wider sense, the treaty recognised that France had a considerable and legitimate interest in the northwest Atlantic and Gulf fisheries. This developed into an historic right, protected by treaty, which France still exercises, and defends with vigour against potential abridgements by Canada. But while French maritime rights were largely preserved in 1713, the territorial balance in the region shifted towards Britain, which also acquired Nova Scotia (but not yet Cape Breton or Ile Saint Jean) by the same treaty. Fifty years later the process culminated in Britain's domination of North America, France being restricted to the tiny off islands of St. Pierre and Miquelon, ceded explicitly to serve as an *abri* for French migratory fishermen.

This essay traces the evolution of the Newfoundland provisions of the Treaty of Utrecht, and outlines later arguments over their meaning. In tracing one issue through the complicated — indeed, tortuous — political and diplomatic situation which eventually produced the treaty, there is a danger that its importance can be exaggerated, and that distortions can be caused by too specific a focus. Nevertheless, an analysis of this kind places the Newfoundland fisheries in context, and at least allows reassessment of an issue which in general histories of the period, concerned primarily with European international relations and politics, is either ignored or given rather cursory treatment.¹ Histories of 18th-century North America give Newfoundland more attention,

but in the story of Anglo-French rivalry on the continent, or that of the evolution of colonial societies, other places and issues understandably take precedence.² The most adequate accounts are those provided by the North American diplomatic historians F.G. Davenport³ and Max Savelle,⁴ and, more importantly, by R.G. Lounsbury in *The British Fishery at Newfoundland, 1634-1763*,⁵ which nevertheless contains some inaccuracies and is primarily concerned with the treaty's place in fisheries history. Yet during the negotiations for the Treaty of Utrecht the future of Newfoundland and its fisheries was inextricably linked to that of Acadia and Cape Breton, and for strategic and economic reasons both France and Britain had a considerable stake in an outcome satisfactory to their interests. As a result, agreement on the North American articles was difficult and long delayed, and their eventual content highly controversial.

In both countries the fisheries were regarded as significant economically, and as an essential component of maritime power. English ships sailed from west country ports to the coast between Cape Bonavista and Cape Race, where their crews fished inshore, salted and dried their catch, and shipped it for the most part to Mediterranean and Iberian markets. The larger French fishery concentrated in two areas, the northeast coast beyond Cape Bonavista (the *Petit Nord*), and the south coast around Placentia Bay, the Burin Peninsula and St. Pierre (the *Côte du Chapeau Rouge*). In the 1660s France created a settlement and military base at Plaisance (Placentia). The catch, partly dried, partly green, caught both inshore and on the banks, was consumed by the French domestic market, and also in Spain and Portugal. In both countries the fisheries generated employment and wealth; they also trained mariners who could be pressed into service in time of war, a permanent naval reserve. These were vital considerations. But in addition, Britain had to secure a settlement that would enhance the security and promote the interests of its New England colonies, while France was concerned to maintain a secure sea route to Canada which, apart from its economic importance, was the potential key to the containment of British power in North America.

The Atlantic region of New France was a minor theatre of war, the most important event being the capture of Port Royal and hence Acadia by an Anglo-American force in 1710. In Newfoundland, French expeditions from Placentia had captured a number of outposts and St. John's itself, but had been unable to hold the advantage. Privateers had roamed the seas.⁶ Canada had resisted British and American attacks, and the 1711 season saw the abject failure of an English naval expedition against Québec. War weariness was growing in both France and England by 1710, and there was a readiness — allies permitting — to negotiate a peace. Both sides understood that one of its features would be significant adjustments in North America. The British government was certainly well aware of mercantile pressure to force France out of Newfoundland.⁷

The first general peace talks took place at The Hague in 1709. The British ambassadors were instructed that they were

to give the Pensionary and such others of the States as shall be thought proper, to understand that We think Our just right to Newfoundland and Hudson's Bay to be of so great and necessary importance to Us and Our Realms that We cannot give Our consent to a Peace unless the aforesaid Countrys and places be agreed to be restored to Us.⁸

Subsequent letters insisted that "the restoring of Newfoundland and Hudson's Bay" be in the preliminary articles of peace, and that Britain had a right to expect the inclusion "of the Islands and Banks belonging to Newfoundland."⁹ The Duke of Marlborough told de Torcy, the French foreign minister, that Queen Anne had instructed him

to insist particularly on the restitution of Newfoundland; since this matter so deeply interested the whole nation, that it would be doing a particular pleasure to his mistress to settle it as a preliminary article.

Torcy was without instructions on this matter, but thought it could be settled "either by exchanges, or by mutual restitutions on the part of England." However, he made Marlborough "sensible of the importance of the Newfoundland fishery, in training up and exercising a great number of French mariners."¹⁰

In the draft preliminary articles drawn up by the allies, France was to cede to Britain "whatever France possesseth in the isle of Newfoundland" subject to conditions to be settled at the conclusion of the general peace, and subject to a mutual restitution "of all the countries, islands, fortresses and colonies, which both sides have occupied ... in whatever part of the [West] Indies."¹¹ While Torcy was prepared to accept this article, the allied demands as a whole were so enormous as to be unacceptable to the French government, and the belligerents prepared for another season in the field.¹² At another peace conference at Gertruydenberg in 1710, Britain made similar demands concerning North America; once again, however, it proved impossible to reach a settlement.¹³

The process that was to lead to Utrecht and a lasting peace began in England. The war and the Whig ministry which supported its continuation had become unpopular in the country as a whole, and with the queen. During 1710 Robert Harley's Tory party, standing for peace and the queen's liberation from the clutches of the Marlboroughs, consolidated its control of the government, and gained an impressive majority in a general election.¹⁴ Late in 1710 Harley secretly opened communications with the French court through François Gaultier, chaplain in the Earl of Jersey's household. His strategy was to negotiate on the basis of a secret Anglo-French understanding, which the other members of the Grand Alliance would be forced to accept — the official peace conference being preceded and paralleled by private negotiations elsewhere. He was also prepared to be flexible on some key issues.¹⁵ By April, 1711, preliminary articles to guide a general peace were under discussion, and the queen at last informed the cabinet and her Dutch allies of what was afoot.

Hoping to speed the secret and specific Anglo-French agreement which was to accompany the general settlement, the Tory ministry dispatched the poet and diplomat Matthew Prior to Paris — where he was well known as “un homme d’esprit, bien intentionné”¹⁶ — not to negotiate, but to acquaint Torcy with the concessions which England expected. Among these remained the surrender of Hudson’s Bay and all Newfoundland. Other North American territories would be kept by whichever side held them at the time of ratification.¹⁷ Torcy expressed satisfaction that the “odious preliminaries” of The Hague had been abandoned, but complained that the queen was expecting “exorbitant advantages for her subjects in return for this favour.”¹⁸ On the subject of Newfoundland, Prior reported, Torcy showed some animation:

“Now,” says he, “say whatever you please for Newfoundland, we can say the same and more; it is the nursery of our seamen, our fishers are obliged, as yours are, to take young men to perform that voyage ... and for the fish we have more need of it than you, for we are indispensably obliged to consume it ourselves, while you for the greatest part propose to yourselves only the profit of selling it to others.”

Prior suspected some future difficulties in this area, particularly since Britain now held Acadia, but “knowing likewise that it is not of so great consequence to us, provided we remain possessed of their part of Newfoundland,” he said no more — except to remind Torcy of the antiquity of Britain’s claim to the island:

and as to Newfoundland, the words *terre neuve* is but the interpretation of the English name, and even before that name was given to the place it was found by Sebastian Cabot, possessed by the English in the time of Henry the Eighth, and known by the name of Avalon.¹⁹

For all his annoyance at Britain’s demands, Torcy did not abandon the negotiation, having come to the conclusion that while England wanted to enhance its commercial position, “elle ne pretendoit pas ruiner celui des autres nations de l’Europe.”²⁰ Instead, Prior returned to London with Nicolas Mesnager, a lawyer and diplomat with mercantile connections, who had already informed his government that since France had “un besoin indispensable” both for dried cod and the training and employment generated by the fishery, “il seroit douloureux” to cede Placentia and Newfoundland.²¹ However, his instructions allowed him, if necessary, to cede these places, but only on condition that French fishermen could continue “la pêche et la sécherie de Moruë, dans la partie du petit Nord de cette île, comme ils l’ont pratiqué jusqu’à présent.” Further, the British would have to renounce any claim to Cape Breton and St. Pierre, and return Acadia and any part of Canada that might be conquered.²²

The most important figures on the British side were Henry St. John, Secretary of State for the Northern Department, and Harley, recently created Earl of Oxford.²³ Agreement was reached on a wide range of issues. With regard to the general settlement, France would recognise the Protestant

succession, prevent any union of the French and Spanish crowns, destroy the fortifications at Dunkirk on certain conditions, and allow adequate barriers for the Dutch and the Empire. This much would be made public. Secret articles contained the concessions to England. Gibraltar and Port Mahon would remain in British hands; Britain would acquire from France the monopoly of the Spanish American slave trade for thirty years (the *Asiento*), and commercial privileges in Spain; and the French would leave Hudson's Bay and Newfoundland.²⁴ But there was no agreement on Acadia and Cape Breton, which France continued to insist should be returned, and "The contest grew warm about the power ... of taking and drying cod-fish on the banks of Newfoundland,"²⁵ Mesnager insisting that the French should be allowed to fish their traditional grounds anywhere on the Newfoundland coast. Eventually St. John agreed, both he and the queen being anxious for peace. But then the ministry received objections from London merchants, and Prior proposed that the fisheries question, as well as other North American matters, be referred to the general conference. Mesnager declined to abandon "so capital a point" to France, which was at the same time "insignificant ... to the English ... since they were promised an extent of sea shore, more than twice sufficient for their fishery. You are men of honour, said he, you have given your word, and I insist upon your performing it. The whim of a few merchants ... ought not to make the queen break her promise."²⁶ The point was conceded once again, probably because news had arrived of the failure of the expedition against Québec — if it had succeeded the ministry's bargaining position would have been much stronger — and article 8 of the preliminaries simply referred all North American matters to the general peace conference, "bien entendu que la faculté de pescher et de secher la Morue sur l'Isle de Terre neuve sera reservée aux François."²⁷ It was a loose, badly worded article, characteristic of the hastiness with which the preliminaries were agreed — a hastiness explained by the impossibility of maintaining secrecy, the anger of the Dutch at potential abandonment, and the queen's anxiety for a settlement — indeed, it was she who specifically authorised St. John to concede fishing rights.²⁸

The general peace conference convened at Utrecht in January, 1712. The British ambassadors, the Earl of Strafford and the Bishop of Bristol, ignorant of the secret preliminaries, were instructed to demand the cession of Acadia, the restitution of Hudson's Bay, and that Newfoundland (with Placentia) "be yielded to us."²⁹ The French representatives (one of whom was Mesnager) received a memorandum from the Comte de Pontchartrain, minister of marine, which stressed the superiority of the French claim to sovereignty over Newfoundland, and the advantage to both powers if each continued to occupy those parts of the island "qu'elles ont chacune occupés avant la presente guerre."³⁰ However, France had already agreed that England should have Newfoundland, and there was no hope of substituting the *status quo ante*. In an

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attempt to limit the damage therefore, France should seek to retain Acadia and Cape Breton, insist on the comprehensive fishing rights that Mesnager had cleverly negotiated in London, and demand the demolition of the fortifications at Placentia, whose beach the French still wanted to use. In the negotiations which followed, both sides largely stuck with their instructions,³¹ and there the matter rested until, late in March, the French government proposed that if it could have Acadia and Cape Breton,³² Britain could have all Newfoundland, its adjacent islands and Placentia; in addition, France would give up its claim on the fisheries. The deal could be sweetened by adding to the agreed cession of the West Indian island of St. Christopher, the islands of St. Martin and St. Barthélemy. France could not afford to lose both Acadia and Cape Breton: "Car en cedant l'un et l'autre, le Canada devient inutile, l'entrée en est fermée, toutes les pesches cessent, et la *Marine de France* se détruit absolument." It was vital to prevent a situation whereby the conclusion of the peace might depend on their cession, and the ambassadors were instructed to insist at the very least on retaining Cape Breton.³³

From the British point of view, it was vital to the security of New England and its fisheries that France be removed from Acadia, and the proposal was rejected. In reply the French offered to cede mainland Acadia, but not Cape Breton or any island in the Gulf. Newfoundland would be ceded on condition that the fortifications at Placentia were destroyed (to prevent interruption of the French fishery in the area) and that "le droit de pêcher et sécher la morue franchement et librement sur la dite Isle de Terre Neuve, demeurera aux François dans les mêmes lieux ou ils ont coutume de le faire."³⁴ The vagueness of the preliminaries made these demands difficult to counter. Yet if the French retained the right to fish and dry at Newfoundland and to settle Cape Breton, noted the Board of Trade, "they will yield us by this 11th Art. in words something, in substance little." The best way out of the difficulty might be "that if they yielded Placentia to us, and did not insist upon Cape Breton, they might be allowed to Fish & dry on that part of Newfoundland which is called *le petit Nord*."³⁵

For the next few months the French government persisted in its attempt to regain Acadia, while continuing to negotiate on other points; and in an effort to break the deadlock, sent Gaultier to London in late April. A month later St. John made a new proposal whereby Acadia ("selon ses limites anciennes"), Newfoundland and Placentia (intact, including guns and munitions) would be handed over, the French shore fishery would be confined to the Petit Nord,³⁶ and Cape Breton would be shared, each country undertaking not to erect fortifications either there, or on the islands in the Gulf and near Newfoundland.³⁷ Torcy was unwilling to go so far. The fortifications at Placentia could remain, but not the arms and munitions; since the preliminaries mentioned neither the islands adjacent to Newfoundland, nor coastal fishing

limits, such matters could not be admitted. To share Cape Breton was impractical, and France must have the right to build fortifications there. If Britain held Acadia, Newfoundland and part of Cape Breton, he pointed out, and France had no fortifications in the region, it would lose Canada in any future war. Once again he offered to trade Newfoundland and its fisheries for Acadia.³⁸

By early August there had been some progress at Utrecht, where the French proposed limiting their coastal fishery to the two main areas used by their fishermen, the Petit Nord and "the Coast called in their maps Chapeau Rouge, stretching from the Bay of Placentia, towards that of St. Laurence."³⁹ There was, however, a dispute over the definition of the Petit Nord, the French complaining that on British maps it was marked on the west coast "*où la pesche ne vaut rien*," while French maps placed it on the east coast "*où la pesche est excellente*."⁴⁰ The French also offered a compromise on the adjacent islands issue, proposing that the cession include those within half a league of the coast. This would conveniently have allowed them to retain St. Pierre and some other good fishing stations. They refused to hand over the munitions at Placentia. As for Cape Breton, the English now seemed ready to consider French possession. The French were "very positive it would be the ruin of their Colony of Canada, if parting with Placentia they have not some other place for their Ships to repair to," reported the ambassadors. "We cannot perceive we shall be able to conclude unless that Liberty be left them one where or another nearer than the Mouth of the River St. Laurence."⁴¹ A problem here, however, was the English insistence on treating the matter "*comme une concession à l'avenir au lieu que cette Isle avoit toujours appartenu de droit au Roy*" — similarly, the French objected to treaty language which implied that Newfoundland had first belonged to England.⁴²

In August, St John — now Viscount Bolingbroke — visited Paris with Prior for direct talks with Torcy. North America was not high on the agenda, but Bolingbroke denied any intention to question France's title to Acadia, and agreed that the Newfoundland article should be so worded as to avoid any expression that "*sembleroit attribuer un droit de premiere possession de part et de l'autre*." However, he insisted on the Placentia arms and munitions, and made it clear he expected specific limits on the French coastal fishery. At this point, Torcy was unwilling to admit any restriction other than abandoning Placentia Bay.⁴³ Not only was the negotiation stalemated, but it became even more complex, as the British increased their demands: the French should agree not to fish within thirty leagues of the southwest coast of Nova Scotia, or within ten leagues of the northwest coast; they should drop all claims to islands outside the Gulf, including St. Pierre and Sable Island, as well as the idea of a half-league limit around Newfoundland; finally, the coastal fishery should not only be restricted to the Petit Nord, but also be given definite annual time limits.

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Another irritant was the argument that in those territories which Britain regarded as restitutions rather than cessions — Hudson's Bay and Newfoundland — French subjects should not be allowed to sell their possessions.⁴⁴ This tough attitude was further reflected in the instructions given the Duke of Shrewsbury, who was appointed ambassador to France in December. The "most essential Dispute that remains between Us and the French Court," they read, "consists in fixing the bounds of their fishing and drying their Fish on the Coasts of Newfoundland, and in the possession of Cape Breton." Torcy had asked for Acadia in return for the fisheries; he was to be offered Cape Breton instead. Since sharing either the Newfoundland coast or Cape Breton might "occasion frequent and dangerous Disputes," this seemed the best and neatest solution.⁴⁵

Prior had remained in Paris after Bolingbroke's departure, and it was he who managed, in private negotiation with Torcy, to break the impasse along lines already agreed between himself and Bolingbroke. "The whole Affair of Newfoundland both as it had been cooked at Utrecht, and delivered to me to be discussed at Paris, was a Brouillon, upon which the Plenipotenrs. on both sides are at this moment fighting in the Dark," he told Oxford.⁴⁶ It was time for flexibility. Torcy continued to insist on "their undoubted and never yielded right to Cap-breton (in wch. I [Prior] am afraid they are too well founded)," and argued — with justification — that the wording of the preliminaries allowed a French fishery both on the Petit Nord and at Chapeau Rouge.⁴⁷ He therefore repeated a proposition already advanced at Utrecht, that their fishing area should extend from Fortune Bay west and north about to Cape Bonavista, on the dubious grounds that the Cape Breton fishery was insufficient:

That the Newfoundland fishery is absolutely necessary for the support of the kingdom in general, and more particularly for the subsistence of the maritime provinces of Western France, where thousands of families would be reduced to beggary, in case that the fishery be taken from them, and will suffer very much by the concessions already made.⁴⁸

Prior was a sympathetic and flexible negotiator, but he did not know a great deal about the fisheries. He conceded Cape Breton with the right to fortify, supported French objections to staying ten leagues off the northwest coast of Nova Scotia and to the establishment of fixed dates for the fishing season,⁴⁹ and agreed they should have St. Paul Island and the islands in the Gulf. Britain would receive mainland Acadia, with Sable Island, and Newfoundland with all adjacent islands, including St. Pierre. Prior then persuaded Torcy to agree to Bolingbroke's proposal that the boundaries of the French fishery should be placed at Cape Bonavista and Point Riche, a much more restricted area than originally proposed. Prior was pleased with himself:

I think it gets us safely off from the too extensive clause in the Preliminaries, gives us the advantage in every part of the fishery, leaves the Queen entirely Mistress of all that is worth having in Newfoundland, and does really (as Monsr. Desmarais expresses it) drive the French *au bout du monde*.

He claimed to have spoken to people in Paris who knew Newfoundland, all of whom agreed that the west coast from Cape Ray north was

a fishery yet unknown and such as has not been reckoned with trying, and that the whole Fishery except a less sort in the petit Nort lyes Southd. from Bona Vista, to C. de Raco, and from thence along the Bay of Placentia to Chapeau Rouge and C. Roy which is now in Her Majesties hands without the French being any way to interfere [?] therein.

Shrewsbury reported that as a result of the deal his instructions had become irrelevant.⁵⁰ But Bolingbroke delayed taking action since he wanted to use the draft arrangement to bring pressure on the French government to conclude an unsettled treaty of commerce. In January, 1713, he proposed that if France agreed to his tariff proposals, Britain would allow a French fishery on the Petit Nord, and French possession of Cape Breton. Governed by his original instructions, Shrewsbury continued to refuse to recognise Prior's deal.⁵¹ "Your Friend Torcy is in the last Concern [sic] to find the Duke's Instruction so strict in a point which cannot be given up by France," wrote Prior to Oxford, "at a time when we all hoped that difference was adjusted."⁵² Bolingbroke held firm, informing the French ministry through Shrewsbury that the queen would have quickly consented to the Newfoundland proposal, had they not caused difficulties over the treaty of commerce.⁵³ As it was, he told Prior, until that was settled, and the French representatives at Utrecht changed their proposals,

it was not thought fit to add, what we see we may obtain when we shall please to come to it, that is the restraining their fishery to the Petit Nord ... which as you [Prior] observe is the most favourable concession we have yet had from France upon this difference, for the French plenipotentiaries at Utrecht have not receded hitherto any further as I find than to Cap de la Haune or the Bay of Fortune.⁵⁴

By early February the commercial agreement was settled and the treaty was essentially complete. The final problem was persuading France to accept the thirty league boundary off Nova Scotia, Britain dropping its demands for another boundary off the northwest coast, as well as for specific time limits on the French fishing season at Newfoundland. The French eventually agreed, and the final treaty was signed at Utrecht on April 11, 1713. It enshrined the arrangement made between Torcy, Prior and Bolingbroke. By article 12, France ceded "la nouvelle Ecosse autrement dite Acadie, en son entier, conformément à ses anciennes limites" and agreed not to fish within 30 leagues of the coast "au Sudest, en commençant depuis l'Isle appelée vulgairement de Sable inclusivement, & en tirant au Sud-Ouest." It was agreed in article 13 that Newfoundland and the adjacent islands "appartiendra désormais & absolument à la G.B.," and that the French would abandon whatever settlements they had there. They could catch and dry fish in season only on the coast between Cape Bonavista and Point Riche. Cape Breton and all other islands "dans l'embouchure & dans le Golphe de St. Laurent, demeureront à l'avenir à la France," which had the freedom to fortify "une ou plusieurs Places."⁵⁵

These articles were the subject of a great deal of controversy in the years immediately following the peace. The Whigs, who returned to power with the Hanoverian succession in 1714, turned on their predecessors and the treaty. Oxford was impeached, Bolingbroke fled abroad, Prior was disgraced. For long after, Utrecht was associated with Jacobitism, double-dealing and secret intrigue, with Bolingbroke cast as the villain. While some aspects of the negotiations were undoubtedly devious, in making peace the Tories were responding to the wishes of the public and the queen, and to a changing international situation in which France no longer seemed to constitute an immediate or serious threat. On balance, the Tories negotiated significant gains. But the mercantile sector was angered by the permission given France to fish on the *Petit Nord*, and by the French occupation of Cape Breton.⁵⁶ A House of Commons Committee of Secrecy, appointed by the Whigs to investigate the negotiation of the peace, severely criticised the wording of the preliminaries, and pictured the Tories as being manipulated by the French.⁵⁷

French policy was certainly clearer than that of Britain. Recognising that concessions would have to be made, the French were ready from the outset to restore Hudson's Bay and abandon claims to Newfoundland — both considered peripheral areas — so long as the fishery was maintained. Canada had to be preserved; and to defend and supply Canada, France had to occupy (if possible) both Acadia and Cape Breton.⁵⁸ It was this clarity of purpose that allowed Mesnager to gain a significant initial advantage, immediately establishing France's right to fish anywhere in Newfoundland waters, the Tories in their hurry and anxiety failing either to define the right, or to extract a balancing concession. In MacLachlan's words, they "slurred over their demands in Newfoundland."⁵⁹ The Committee of Secrecy was more forthright: "The Ministry suffer'd themselves to be so grossly imposed upon in this Article, that they gave directly to France all they wanted, which was a Liberty of taking and drying their Fish; whilst France gives nothing at all to us, but refers our most valuable interests to the general Conferences."⁶⁰ Partisan as the committee was, this is fair, if sharp comment.

British policy was comparatively confused. For some years opinion had been growing that one of the objects of the war should be the elimination of France from the North American fisheries. The British migratory fishery had been severely damaged during the war, and much of the blame was placed on France's expanding fishery, and its possession of Placentia, which provided a base for raids into English territory. Merchants involved in the trade argued that Britain should assert control over all of Newfoundland and Acadia, and monopolise the fisheries to the great advantage of the economy and the navy. They complained that French control of the island's south coast gave their competitors a longer season and better drying conditions which, combined with cheaper salt, wages and provisions, gave them a considerable advantage in the

markets.⁶¹ New Englanders joined in the clamour, anxious about the future of their fisheries and their trade with Acadia and Newfoundland. In addition, the government was conscious of the strategic necessity to expand its control over the territories northeast of New England.

These expansionary pressures were counterbalanced by political and other factors which dictated caution. The Tories were firmly committed to a peace; they could not afford to fail, nor to engage in military demonstrations to improve their bargaining position — particularly after the summer of 1712, when British troops were ordered not to play an offensive role in that year's campaign. Moreover, France had shown itself to be remarkably resilient. From the beginning there was an urgency about the negotiation which, combined with the ministry's internal tensions, militated against clear policy and enabled Torcy "to leave loose ends, which might have been tidied up, or to reach agreement under the cover of an ambiguous phrase."⁶² Negotiators were preoccupied with European issues, and with fabricating a peace which could have a chance of lasting, because it restored a balance of power — an imprecise concept which was nevertheless increasingly influential.⁶³ Few 18th-century statesmen were interested in the total defeat and humiliation of their enemies, even if that had been possible; what concerned them was the preservation of essential national interests, and the prevention of the domination of Europe by a single country or dynasty. "The negotiations with France that produced the Peace of Utrecht," it has been noted, "were in effect a resumption of the partition-treaty diplomacy and also, after a period of strident demands by the Grand Alliance, of the principles of compromise, equivalents and exchanges that characterised many negotiations in this period."⁶⁴

In this context, demands for the expulsion of France from the Atlantic region of North America were unrealistic — unless Britain wanted to mount yet another expedition against Canada, and provide territorial compensation. Compromise here as elsewhere was necessary, particularly since France had shown that unless this occurred, the whole peace could be delayed or jeopardised. Unable to face that prospect, and anxious to buy French agreement to the commercial treaty — which, ironically, was defeated in Parliament⁶⁵ — the ministry agreed that the region would be shared. But they had not thought this out in advance, and as a result muddled through to an agreement which, though advantageous to Britain in some ways, contained much that was unclear.

The treaty established that Britain now in some sense owned mainland Acadia, while France owned Cape Breton and effectively controlled the Gulf. Britain clearly possessed all Newfoundland, and had a dominant position in its coastal fisheries, though French fishermen could use the Petit Nord in season. But what did article 13 actually mean? The British view, expressed at Utrecht and for many years after, was that Newfoundland had always belonged to Britain by virtue of prior discovery by the Cabots, the formal claim lodged by

Sir Humphrey Gilbert, and by administration and use. Thus the French settlements in southern Newfoundland were strictly encroachments, and in giving them up, France was merely restoring to Britain its rightful property, and recognising a sovereignty which already existed.⁶⁶ This was not an argument which France was prepared to admit, believing that it had a better claim to the island by virtue of the early voyages made by Norman and Breton fishermen, and extensive use of the coastline by French fishermen. However, rather than argue the point, French negotiators thought it more practical for both sides to accept that Newfoundland had always been shared, each country having its defined zone.⁶⁷ Failing this, France refused to accept treaty language which impugned its claim to sovereignty, or denied that it was making a cession rather than a restitution. The carefully worded definitive treaty was therefore neutral on this point. It was also silent on the related question of the nature of the French fishery on the *Petit Nord*: was it to be considered a privilege granted by Britain, or the traditional property of France, reserved at the time when its other possessions in Newfoundland were transferred to Britain? The decision to avoid definition was understandable within the context of the negotiations, and mattered little so long as both countries treated Newfoundland only as a base for their migratory fisheries and on the whole respected, as had always been the case, their respective zones. In the period following Utrecht, French fishermen concentrated their efforts north of Cape St. John, tolerating a limited concurrence in *Notre Dame* and *Bonavista* bays, where English fishermen began to arrive in the 1720s.⁶⁸ But during the Seven Years' War, English fishermen and settlers spread more extensively along the northeast coast and into traditional French grounds beyond Cape St. John. With the return of French fishermen in 1763, the question of the rights of each side became of immediate importance, with appeals being made to the deliberately ambiguous language of the treaty.

France claimed that its right to fish in season on the *Petit Nord* was absolute and exclusive, since it was not a British concession, but

une reserve du propriétaire qui cédaît la propriété de tout le territoire qu'il possédait avec la pêche sur une partie de ce territoire, et qui pour prix de cette cession et d'autres sacrifices encore, retenait pour lui pendant un certain temps de l'année sur le reste de ce territoire spécifié ci-dessus, les fruits dont il jouissait seul ... au moment qu'il en cédaît la propriété

...⁶⁹

In addition, France argued that the intent of the negotiators was to separate the fishermen of each nation into separate zones, and that concurrence, by limiting their freedom to fish, constituted a breach of the treaty.⁷⁰ The British view was that their fishermen had every right to use the Treaty Shore, since the treaty said nothing about exclusivity. Utrecht had given France the "liberty" of a seasonal use of the *Petit Nord*. Otherwise Britain possessed "the absolute property of the whole island of Newfoundland without any exception whatsoever." Although British fishermen

may not in times past have frequented the northern parts of the Island of Newfoundland so much as the French, yet they have from time to time resorted to and exercised the fishery on every part of the coasts of the Island agreeably to the most undoubted right they have by the words of the Treaty of Utrecht ...⁷¹

Subsequent Anglo-French treaties which covered the Newfoundland fisheries — in 1763, 1783, 1814 and 1815 — avoided these basic disagreements by simply renewing the relevant part of article 13.⁷² They were never resolved, and the argument over the nature of the French presence on the Newfoundland coast continued until the article was extinguished in 1904. Had the question ever gone to arbitration — which neither side thought wise — it is likely that France would have had the better of the historical arguments. Though the “reserved sovereignty” theory was thin, it was no more so than Britain’s claim to sovereignty over an island which, until 1713, it had always shared with others, using a relatively small portion of the coastline. It cannot be disputed, either, that the intention of the treaty was to create separate fishing zones. The strength of the British theory of concurrence lay not so much in historical circumstances, as in its consistency with British sovereignty over Newfoundland, and its resulting control of coastal waters. It was as difficult then for Britain (or Newfoundland in later years) to admit an exclusive French fishery within a British jurisdiction, as it is now for Canada to admit a French claim to the ownership of a large area of the continental shelf within the 200-mile limit.⁷³ Both constitute anomalous and unacceptable limitations on sovereignty.

In 1889, in the midst of yet another round of the seemingly endless dispute over the Newfoundland fisheries, Lord Salisbury wrote wryly to his Colonial Secretary, Lord Knutsford, of the irony that they “should be paying, in hopeless weary negotiation, the penalty of Bolingbroke’s abortive intrigues a hundred and eighty years ago!”⁷⁴ His exasperation at the impossibility of mediating between the Newfoundland and French governments is understandable. But Bolingbroke and others concerned with the Treaty of Utrecht never expected Newfoundland to be anything but a fishery, one factor in the continuing process of adjustment between Britain and France in an age when foreign policy was governed by rather different principles than those which were to emerge in the future. Taken as a whole, Utrecht was a significant achievement. So far as North America was concerned, Britain’s position was significantly strengthened. A French fishery seemed a small price to pay.

*I am grateful to John Reid and Olaf Janzen for their comments on an earlier version of this paper.

Notes

¹For example, in his standard account of the peace in volume III of *England Under Queen Anne. The Peace and the Protestant Succession* (London, 1934), G.M. Trevelyan discusses Newfoundland in connection with the preliminaries (pp. 184-5), but does not mention it again. The

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same is true of B.W. Hill's account in *Robert Harley. Speaker, Secretary of State and Prime Minister* (New Haven, 1988). A.D. MacLachlan deals with the question accurately but briefly in "'The Great Peace'. Negotiations for the Treaty of Utrecht, 1710-1713" (Ph.D. thesis, Cambridge University, 1965), pp. 614-5, 617.

²Dale Miquelon, in *New France 1701-1744. "A Supplement to Europe"* (Toronto, 1987), gives a considerable amount of space to Acadia and Cape Breton, rather less to Newfoundland.

³F.G. Davenport, *European Treaties bearing on the History of the United States and its Dependencies*, Volume III (Washington, D.C., 1934), pp. 133-219.

⁴Max Savelle, *The Origins of American Diplomacy: the International History of Angloamerica, 1492-1763* (New York, 1967).

⁵New Haven, 1934 (reprinted 1969), pp. 233-243.

⁶Miquelon, *New France*, pp. 32-58.

⁷Council of Trade and Plantations to the Queen, 2 June 1709, *Calendar of State Papers. America and West Indies. 1708-1709* (London, 1927), pp. 323-331 [CSP AWI]. Memorials of merchants of Bristol and Bideford, 1710, *CSP AWI 1710-11*, pp. 227, 244, 250.

⁸"Instructions to John Duke of Marlborough and Charles Viscount Townshend, appointed Ambassadors Extraordinary and Plenipotentiary", 2 May 1709, printed in L.G. Wickham Legg, *British Diplomatic Instructions 1689-1789. Volume II - France, 1689-1721* (London, 1925), pp. 9-11. Savelle, *American Diplomacy*, pp. 125-7.

⁹Henry Boyle (Secretary of State) to Marlborough and Townshend, 18 and 24 May 1709, 30 May 1710, *Ibid.*, pp. 12, 14, 22.

¹⁰Torcy to the King, 22 May 1709, in *Memoirs of the Marquis of Torcy, Secretary of State to Louis XIV* (translation, London, 1757), I: 304, 310.

¹¹*Ibid.*, I:363.

¹²E. Gregg, *Queen Anne* (London, 1980), p. 287-8.

¹³Lounsbury, *British Fishery*, p. 234. J.C. Rule, "France and the Preliminaries to the Gertruydenberg Conference", in R. Hatton and M.S. Anderson (eds.) *Studies in Diplomatic History* (London, 1970), pp. 97-115. Boyle to Townshend 30 May 1710, in Wickham Legg, *Diplomatic Instructions. II-France*, pp. 21-2. Savelle, *Origins of American Diplomacy*, pp. 127-129.

¹⁴Gregg, *Queen Anne*, pp. 289-322.

¹⁵*Ibid.*, p. 335.

¹⁶"Par Mr. Du Thiel. Negotiations de M. Mesnager en Angleterre en 1711" n.d. Archives du Ministère des Affaires Etrangères (Paris), *Mémoires et Documents, Angleterre*, Volume 17, p. 10. The pagination in all references to this series is that of the transcripts available on microfilm at the National Archives of Canada.

¹⁷Britain's secret "Preliminary Demands" of 1711 are in SP 103/15, p. 6 (Public Record Office, London).

¹⁸Torcy, *Memoirs*, II:131.

¹⁹*Historical Manuscripts Commission. Portland Manuscripts*, Volume v (London, 1899), p. 36.

²⁰L.G. Wickham Legg, "Torcy's Account of Matthew Prior's Negotiations at Fontainebleau in July 1711", *English Historical Review* xxix (1914), p. 531.

²¹M. le Dran, "Mémoire historique sur ce qui a esté stipulé par la paix conclue à Utrecht ... au sujet de leurs Etats en Amerique", 31 December 1724. *Mémoires et Documents*, 17:109.

²²"Instruction pour le sieur Mesnager, chevalier de l'ordre de St. Michel, député au conseil de commerce", 3 August 1711, printed in Paul Vaucher (ed.), *Receuil des Instructions données aux ambassadeurs et ministres de France depuis les traités de Westphalie jusqu'à la révolution française*, xxv-2. *Angleterre, tome troisième (1698-1791)* (Paris, 1965), p. 96. See also A. Legrelle, *La diplomatie française et la Succession d'Espagne* (Paris, 1892), IV:600-605; and Davenport, *Treaties*, p. 144.

²³Trevelyan presents St. John as the dominant force in the talks (*Protestant Succession*,

p.180). More recent studies have tended to emphasise the importance of Harley's role; for example, A.D. MacLachlan, "The Road to Peace, 1710-13", in G. Holmes (ed.), *Britain after the Glorious Revolution* (London, 1969), pp. 207-8.

²⁴Gregg, *Anne*, p. 341.

²⁵Torcy, *Memoirs*, II:172.

²⁶*Ibid.*, II:165. C.K. Eves, *Matthew Prior. Poet and Diplomatist* (New York, 1939), p. 250.

²⁷SP 103/15, 38. G. Parke (ed.), *Letters and Correspondence ... of the Right Honourable Henry St. John, Lord Viscount Bolingbroke* (London, 1798), I:233. Davenport, *European Treaties*, pp. 145-151.

²⁸Hill, *Robert Harley*, pp. 164-5. H.T. Dickinson, *Bolingbroke* (London, 1970), argues that by September 1711 St. John was ready to conclude peace at nearly any price, and that this explains the failure to obtain clear answers from the French on Newfoundland, for example (p. 88). On the queen's anxiety for peace, see Gregg, *Anne*, p. 341. There is a full account of the 1710-11 negotiations in Trevelyan, *Peace and the Protestant Succession*, pp. 176-187. Trevelyan errs, however, in stating that France agreed at this time to fish on "a scheduled portion of the coast" (p.184). So does Vaucher, *Receuil*, p. 104. Savelle, *Origins of American Diplomacy*, pp. 130-5, accurately describes the preliminary agreement, but his account of the negotiation process differs from that given in other sources. See also Eves, *Matthew Prior*, pp. 237-250.

²⁹Instructions, 23 December 1711, in *Bolingbroke Correspondence*, I:361.

³⁰Quoted in "Mémoire historique", pp. 111-114. See also Savelle, *Origins of American Diplomacy*, p. 137, and Davenport, *European Treaties*, pp. 155-6.

³¹Davenport, *European Treaties*, p. 194, outlines these exchanges.

³²The question of the precise boundaries of Acadia, and whether Cape Breton was part of it, was a matter of complex dispute, which this essay does not address. During these negotiations, Britain argued that Cape Breton had always been considered part of Acadia, which France denied. The dispute is discussed in Savelle, *Origins of American Diplomacy*, and in John Reid, *Acadia, Maine and New Scotland* (Toronto, 1981).

³³"Mémoire historique", pp. 125-128.

³⁴Enclosures in St. John to Torcy, 29 April 1712, *Bolingbroke Correspondence* I:475.

³⁵Note dated 5 April 1712 in "Obs. relating to the Treaty of peace with France", SP 103/97.

³⁶The British plenipotentiaries had proposed this restriction at Utrecht in late April, to the great indignation of their French counterparts. "Mémoire historique", p. 136.

³⁷"Mémoire" enclosed in St. John to Torcy, 24 May 1712, *Bolingbroke Correspondence* I:510-11. See also "Concerning North America", SP 105/261, p. 61; and "Mémoire historique", p. 138.

³⁸Torcy to St. John, 10 June 1712, *Bolingbroke Correspondence* I:524. SP 105/261, p. 61. "Réponses du Roy au mémoire envoyé de Londres le 5 juin 1712" 10 June 1712, SP 78/154, p. 300.

³⁹Bristol and Strafford to Bolingbroke, 9 August 1712, copy encl. in Prior to Bolingbroke 29 December 1712, SP 78/154, p. 223. The letter is summarised in "Concerning North America" (1712), SP 105/261, p. 61.

⁴⁰Comments on a draft treaty submitted by the British representatives at Utrecht, 8 August 1712, in "Mémoire historique", p. 144.

⁴¹Bristol and Strafford to Bolingbroke, 9 August 1712, SP 78/154, p. 223.

⁴²The "Mémoire historique", pp. 143-150, contains comments on British proposals by the French plenipotentiaries, 8 August; "Observations" by Pontchartrain, 17 August; and instructions sent as a result to Utrecht. These exchanges are summarised in Davenport, *European Treaties*, pp. 196-200.

⁴³Torcy, "Mémoire", 25 August 1712, in "Mémoire historique", p. 150.

⁴⁴Bolingbroke to Bristol and Strafford 20 Dec 1712, SP 104/26, p.181; SP 105/261, p. 243. Bristol and Strafford to Bolingbroke, 12-23 Dec 1712, SP 103/97. King to French plenipotentiaries, 22 Dec 1712, "Mémoire historique", pp. 164-168.

⁴⁵Instructions for Shrewsbury, 11 December 1712, SP 104/26, pp. 92-3.

⁴⁶Prior to Oxford 29 December 1712, SP 105/28, p. 64.

⁴⁷This account of the talks is based on two letters from Prior to Bolingbroke - 28 December, 1712, SP 78/154, p. 204; and 8 January 1713, *Bolingbroke Correspondence* II:159. The draft agreement, communicated by Torcy, "Proposition concertée avec le Sieur Prior", is in SP 105/27, p. 22.

⁴⁸Memoir by Torcy, January 14 and 17, 1713, encl. in Prior to Bolingbroke, 8/19 Jan 1713, *Bolingbroke Correspondence* II:183. Original in SP 78/157, p. 4.

⁴⁹Prior ridiculed these restrictions on the grounds that they were useless, impractical and would cause quarrels (Prior to Oxford 8 January 1713, SP 105/28, p. 70). In contrast, the ambassadors at Utrecht thought some definition of French rights at Newfoundland at least was needed "to clear our right of Possession" (Bristol and Strafford to Bolingbroke 30 December 1712, SP 105/261, p. 349).

⁵⁰Shrewsbury to Dartmouth 14 January 1713, SP 78/157, p. 2.

⁵¹Louis XIV to French plenipotentiaries at Utrecht, 16 January 1713, SP 103/102, p. 52. Shrewsbury claimed to know nothing of the agreement between Torcy and Prior.

⁵²Prior to Oxford, 19 January 1713, SP 105/28, p. 71.

⁵³Bolingbroke to Shrewsbury 25 January 1713, *Bolingbroke Correspondence*, II:206.

⁵⁴Bolingbroke to Prior 19 January 1713, SP 78/157, p. 14. See also Bolingbroke to Bristol and Strafford 26 January 1713, SP 105/261, p. 465.

⁵⁵C. Parry (ed.), *The Consolidated Treaty Series* (New York, 1969), volume 27, pp. 485-6.

⁵⁶"A Report of the Lords of Trade in Consequence of the Treaty of Utrecht", 1714, SP 103/97.

⁵⁷"A Report from the Committee of Secrecy appointed ... to examine ... the late Negotiations of Peace and Commerce ...", 9 June 1715 (London, 1715), pp. 6, 36-8.

⁵⁸Miquelon, *New France*, pp. 49-50.

⁵⁹MacLachlan, "The Great Peace", p. 614.

⁶⁰*Report from the Committee of Secrecy*, p.6.

⁶¹G.J. Davies, "England and Newfoundland: Policy and Trade, 1660-1783" (Ph.D. thesis, University of Southampton, 1980), pp. 53-59, 64. Lounsbury, *British Fishery*, pp. 229-233. These complaints are rehearsed in the "Report of the Lords of Trade", 1714.

⁶²MacLachlan, "The Great Peace", p. 691.

⁶³M.S. Anderson, "Eighteenth-Century Theories of the Balance of Power", in Hatton and Anderson (eds.), *Studies in Diplomatic History*, pp. 183-198.

⁶⁴J. Black, *A System of Ambition? British Foreign Policy, 1660-1793* (London, 1991), p. 147.

⁶⁵"The Price for which they sold to France the Fishery of Newfoundland"; *Report of the Committee of Secrecy*, p. 38.

⁶⁶See above, p.5. The English case is fully stated in a French translation of a mid-18th century pamphlet, "Traité sur la pêche de l'Amerique où sont examinés et discutés les anciens droits de l'Angleterre ...", in *Mémoires et Documents, Angleterre*, volume 13, pp. 5-86. See also a statement by the Council of Trade and Plantations, 2 June 1709, in *CSP AWI 1708-9*, p. 324.

⁶⁷"Mémoire instructif" (1712) by Ponchartrain, quoted in "Mémoire historique", pp. 111-114. "Mémoire concernant la pêche de la morue réservée à la France par les traités sur une partie des cotes de Terre neuve", March 1763, AAE, *Mémoires et Documents, Angleterre*, Vol. 48, p. 78.

⁶⁸J.-F. Brière, "Pêche et politique à Terre-Neuve au XVIII^e siècle: la France véritable gagnante du traité d'Utrecht?" *Canadian Historical Review*, LXIV:2, 1983, pp. 172-3.

⁶⁹"Mémoire concernant la pêche", p. 79. This argument was used by French diplomats in 1763. See Egremont to Bedford, 1 March 1763, in L.G. Wickham Legg, *British Diplomatic Instructions. Vol. VII. France, Part IV, 1745-1789* (London, 1934), pp. 79-81; and Praslin to

Guerchy, 11 November 1763, in E. Daubigny, *Choiseul et la France d'Outre-Mer après le Traité de Paris* (Paris, 1892), p. 307.

⁷⁰Brière, "Pêche et politique", 172-7.

⁷¹Egremont to Bedford, 1 March 1762, in Wickham Legg, *Diplomatic Instructions, France* iv, pp. 79-81.

⁷²In 1783 the boundaries of the Treaty Shore were altered to Cape St. John and Cape Ray.

⁷³At the time of writing, an international arbitration is deciding the maritime boundary around the islands of St. Pierre and Miquelon.

⁷⁴Salisbury to Knutsford, 10 December 1889, quoted in Lady Gwendolen Cecil, *The Life of Robert, Marquis of Salisbury* (London, 1932), iv:356.