

PROJECT OCEAN WAR GRAVES

Situation Report as at August 16, 2016

Three years ago, an initiative was launched which had the following objective:

That the wreck of every Canadian-registered merchant ship and every warship of the Royal Canadian Navy lost through enemy action that contain the remains of personnel (including their apparel and personal effects) associated with those vessels be designated an "Ocean War Grave" and, once so designated, that measures be taken to secure their protection from unauthorized interference.

The thesis for this project arose from a realization that, contrary to claims to be seen on certain monuments that [sailors] "have no known graves", in fact, they most certainly do. Admittedly, the sailors who served in the ships described in the initiative may not rest in individual, neatly-arranged burial places in manicured cemeteries where the flowers grow and where there are crosses row on row - not at all - their remains will be found anywhere in the twisted wreckage of the ship in which they served and fought to save for the next voyage which, for them, never came. More likely, if one chose to look, one may find many in a single compartment piled up against an escape hatch or watertight door which, despite their best efforts, they could not open because they were jammed shut because the ship was twisted out of shape by the explosion which sealed her end - all of which gave rise to the term "Ocean War Grave" - a term which, even today, is neither recognized nor acknowledged conceptually.

Communications in pursuit of the objective.

June 4, 2013 from Canadian Merchant Navy Veterans Association, Inc.:

". . . fully endorses the proposal so ably articulated by Capt. Paul Bender concerning the designation of the sites of wartime Canadian Merchant ship losses as "ocean war graves".

June 13, 2013 from Hon. John Baird:

At first glance, this does appear to be a worthwhile endeavour and, as your Member of Parliament, I'd be happy to discuss this with the Minister Responsible, as well as my caucus and cabinet colleagues on your behalf." (I have no evidence that Mr. Baird did any of these things.)

26 June 2013 from British High Commission:

"I was disheartened to hear that sports' diving has taken place on the wreck [of the Canadian registered merchant ship "Avondale Park"] and my staff will now pass on your letter to the correct authorities in the

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U.K. I find the thoughts of disturbing any wreck from the bitterly fought Battle of the Atlantic an anathema.”

04 July 2013 from The Naval Association of Canada – Ottawa:

“The Board of Directors of NAC-O has reviewed this proposal. . . [and] fully supports Mr. Bender’s project as contributing to one of the NAC-O’s objectives.”

24 July 2013 from Chief of Staff, Judge Advocate General:

“I commend your desire to ensure that the final resting places of our lost sailors are given appropriate recognition and respect. I have therefore forwarded your correspondence to the Commander, Royal Canadian Navy, as well as the Chief, Military Personnel, for their consideration.”

September 13, 2013 from The Canadian Maritime Law Association (of which Association I was a member at the time):

“. . . the concern expressed over those sites containing merchant ships located within Canadian legislative identification, is a matter of on-going study by the Committee. The process concerns the identification of the most practical way of encouraging the Canadian government to protect “heritage wreck”. This is a work in progress. . .” (No further communication on this matter).

October 6, 2013 from the Royal Commission on the Ancient and Historical Monuments of Scotland that:

“. . . [the Canadian-registered merchant ship “Avondale Park”] will henceforth be acknowledged, recognized and respected as an “Ocean War Grave” while retaining her status as an essential component of the maritime heritage of Scotland.” (Note: This merchant ship was the last allied casualty of the Battle of the Atlantic. She has been under the protection of the Royal Commission since about 1960).

30 October 2013 from Commonwealth War Graves Commission:

I want you to know how much I personally admire what you are attempting to do. . .The Commonwealth War Graves commission would be morally supportive of any initiative(s) taken by member governments to protect their ship wrecks and especially the remains of their war dead who lie on the ocean floor entombed in the ships they served. (Note: Canada contributes more than one million dollars each and every month towards the work of the Commonwealth War Graves Commission.)

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2 December 2013 from The Royal Canadian Legion:

“The Royal Canadian Legion is very supportive of your proposal and highly commends you for bringing this situation to light. Please use this letter as an expression of our support for the designation of ships’ remains as an Ocean War Grave.”

8 April 2014 from Parks Canada (e-mail):

“Your request regarding heritage wreck regulations is currently under review. We will follow up with you as soon as it is possible to do so. (They have yet to do so.)

15 April 2014 from Ambassade de France au Canada:

Following your request dated November 29th. 2013, and after consulting the permanent services in France, it is my honour to inform you that France considers the wreck of the HMCS Athabaskan as a maritime cultural asset and, as a result, it is referenced on France’s national archeological map.

Furthermore, France recognizes the sovereign immunity of State vessels; in the event of archeological projects involving the remains of a State vessel flying a foreign flag (as is the case of the HMCS Athabaskan) in waters under French jurisdiction, the government of Canada, as the owning State, will be officially solicited by the relevant services of the French Republic before any authority is given. (Translation). (Note: By letter dated 30 November 2015, the foregoing provisions apply as well to the wreck site of HMCS Guysborough).

July 14, 2014 from Minister of National Defence Nicholson:

“Our government takes this issue (ocean war graves and the protection of military remains) very seriously and continues to explore options to better protect military wrecks and human remains found in them. I have asked officials at the Department of National Defence to inform you of the results of this review. (They have yet to do so.)

I applaud your ongoing endeavour to honour and protect crew members of the Royal Canadian Navy and of the Canadian Merchant Navy whose remains have not been recovered or have been solemnly committed to the sea.”

August 14, 2014 from Minister of the Environment Aglukkaq:

“Parks Canada in co-operation with Transport Canada, is working with the Department of Justice to draft regulations for the protection of heritage wreck. These regulations have not yet been implemented.”

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It is important to note that section 7(1) of the Canada Shipping Act, 2001, excludes application of the Act to “a vessel, facility or aircraft that belongs to the Canadian Forces or s foreign military force or in respect of any other vessel, facility or aircraft that is under the command, control or direction of the Canadian Forces. In light of this exclusion in the Act, the Department of National Defence has to be consulted and would need to support the inclusion of military wreck in the heritage wreck regulations, should this be legally permissible. Initial contact has been made and discussions continue.”

(Note: It became increasingly clear as work progressed on this project that achievability of the objective is dependent upon enabling legislation. To begin with, the term “Ocean War Grave” has not to my knowledge been judicially considered. As defined, it essentially describes a shipwreck accompanied by associated loss of life; otherwise, a shipwreck is merely a wreck and has no need of protection once it has been declared a constructive total loss and abandoned in all respects.

Enabling legislation does exist in the United Kingdom, namely, the *“Protection of Military Remains Act, 1986”*. Departmental policy on the application of this Act, although passed by Parliament in 1986, was published only in 2001. This Act applies to military vessels and aircraft only and makes no provision for designating vessels as “war graves”. Although domestic law, the Act extends to military vessels and aircraft in international waters as well, e.g., to HMS *“Prince of Wales”* and HMS *“Repulse”* both sunk on December 8, 1941 by Japanese aircraft, and which lie in international waters off Malaysia. Accordingly, it is suggested that the U.K. *“Protection of Military Remains Act, 1986”* be deemed to apply and be the law of Canada, *mutatis mutandis*. Precedent for such action may be found in subsection 5(2) of the *Canada Prize Act, R.S.C. 1970, c. P-24*. That sub-section of the *Canada Prize Act* provides that “. . .all Acts enacted by the Parliament of the United Kingdom . . . in respect of ships. . .taken as prize. . .shall apply in, and be the law of Canada, mutatis mutandis. . . Nine warships accompanied by 263 lives lost through enemy action in W.W.II and which lie in Canadian territorial waters would be covered by such action.

In 2005, descendants of named members of the crew from the Danish-flag merchant ship *“Storra”* which was sunk by enemy action with loss of life within U.K. territorial waters, sought to have the ship brought under the provisions of the U.K. *“Protection of Military Remains Act, 1986”* and were successful on appeal in 2006. The successful action in the case of the *“Storra”* could serve as precedent if Canada wished to take similar action with respect to the five unprotected Canadian-registered merchant ships lying in U.K. territorial waters.

The objective of this project can relatively easily be achieved for merchant ships through sub-section 163(2) of the Act which provides joint regulatory authority for the Minister of Transport and the Minister of the Environment to develop regulations to protect wrecks in Canadian territorial waters that have heritage value. Ten Canadian-registered merchant ships accompanied by 217 lives lost through enemy action in the Second World War would be covered by such regulations).

September 17, 2014 from His Excellency the Governor-General of Canada who wrote, in his own handwriting, in response to my report to him dated September 15, 2014 which he requested:

“Dear Paul:

Thank you for your report on Ocean War Graves. I congratulate you on the important and detailed work you have done on this unique project. I wish you every success in bringing it to completion.

Sincerely,

David Johnson.”

January 27, 2015 from Minister of National Defence Nicholson:

“I was sorry to learn about the difficulties you are having in getting a response from departmental officials about ocean war graves and the protection of maritime military remains. You have indeed highlighted a legitimate concern, which we share, and I assure you that we are working towards a solution that protects all those who lost their lives in service and for whom there is a delayed burial or even no hope of a known burial place.

In June, representatives from casualty identification, the military environmental commands ordnance disposal and legal advisors met to discuss the problem you outlined in your earlier letters. Pursuing legislation only for those lost in ships would not go far enough.” (Matter unresolved).

May 19, 2016 from Minister of the Environment and Climate Change McKenna:

“As your concern relates to the wrecks of warships and merchant ships lost through enemy action and remains of personnel associated with those vessels, I have taken the liberty of forwarding a copy of your correspondence to the Honourable Harjit S. Sajjan, minister of National Defence.)

June 9, 2016 from Minister of National Defence Sajjan correspondence unit:

“. . .I would like to acknowledge receipt of your letter of March 15, 2016, about the designation and protection of wrecks of Canadian vessels. Please be assured that your correspondence is being reviewed.)

