

FEDERAL COURT

BETWEEN:

NUNAVUT TUNNGAVIK INCORPORATED

Applicant

- and -

ATTORNEY GENERAL OF CANADA

Respondent

AFFIDAVIT OF GABRIEL NIRLUNGAYUK

I, GABRIEL NIRLUNGAYUK, of Rankin Inlet, in the Territory of Nunavut, MAKE
OATH AND SAY AS FOLLOWS:

1. I am employed by the Applicant as Director of Wildlife. I am involved in a variety of regulatory and policy matters that pertain to wildlife harvesting by Inuit in Nunavut and to the application of the Nunavut Land Claims Agreement (“NLCA”) to Inuit harvesting of wildlife. As such, I have personal knowledge of the matters to which I hereinafter depose, except where my statements are indicated to be based on information and belief.
2. I make this Affidavit in support of an application for judicial review of the decision of the Department of Fisheries and Oceans (“DFO”) not to issue Non-Detriment Findings (“NDFs”) for any narwhal harvested from four new “management units” in waters off Nunavut. As a consequence of this decision, the export from Canada of narwhal

products from these “management units” is effectively prohibited unless and until DFO makes a different decision.

3. In 1993, the Inuit of the Nunavut Settlement Area (the “Inuit”) and the Government of Canada ratified the NLCA, a land claims agreement within the meaning of s. 35 of the *Constitution Act, 1982*. In exchange for the rights and benefits set out in the NLCA, the Inuit agreed to surrender all their aboriginal claims, rights, title and interest in and to lands and waters in the Nunavut Settlement Area. A copy of the NLCA is attached as Exhibit “A” to this Affidavit.
4. The Applicant, Nunavut Tunngavik Incorporated (“NTI”) is a non-profit corporation that represents the Inuit of the Nunavut Settlement Area for purposes of implementing and enforcing the provisions of the NLCA. NTI represents Nunavut Inuit in territory-wide consultations by the federal and territorial governments on wildlife issues. NTI also provides support to Inuit harvesters, Hunters and Trappers Organizations (HTOs) and Regional Wildlife Organizations (RWOs). NTI is a regular participant in the proceedings of the Nunavut Wildlife Management Board (NWMB). The NTI Wildlife Department has a full-time staff of 7 including Inuit staff, specialists in wildlife regulatory issues, and a full-time biologist. The Wildlife Department also draws on outside consultants and experts as required.
5. Nunavut Inuit are a marine people. All but one of the Inuit communities in Nunavut are located on the coast. Inuit are the only harvesters of narwhal in Canada. All narwhal harvested by Nunavut Inuit are taken within the Nunavut Settlement Area.
6. Narwhal is a type of whale found in Arctic waters. They are best-known for having a single tusk that can grow up to 10 feet in length. Like other marine mammals, narwhals have long been a staple of the economies of Nunavut Inuit. In addition to eating the “maktaaq” (the edible layer of skin and blubber) and meat, Inuit also sell narwhal tusks.

7. Nunavut Inuit have been trading and selling narwhal tusks since contact with whalers in the late 19th century. The market for narwhal tusks is almost exclusively an export market. There is no significant domestic market in Canada for narwhal tusks.
8. Narwhal have been listed on CITES' Appendix II since 1979. From 1979 until 2010, DFO permitted the export of narwhal products. The 2010 decision by DFO not to issue export permits is the first-ever prohibition on the export of narwhal products.
9. The ban on export of narwhal products will have a significant adverse impact on Inuit harvesters and Inuit communities in Nunavut. In recent years, prices for narwhal tusks have been in the range of \$1,000 to \$2,000 depending on length and quality. Income from the sale of narwhal tusks is a significant source of income for many Inuit harvesters. While the amounts earned from sales of tusks are modest by southern Canadian standards, in most Inuit communities in Nunavut where narwhal are harvested, there are very few opportunities to earn cash income. Inuit harvesters who sell narwhal products typically use the cash that they earn to buy fuel and to buy food to support their families. In view of the very high cost of basic necessities in Nunavut, the loss of any source of cash income has a significant adverse effect. For example, in Arctic Bay, a community on northern Baffin Island where there has traditionally been a significant harvest of narwhal, fuel is currently \$1.95 per litre; the price of bread is currently \$5.69 per loaf; milk is \$6.19 per litre; a single lettuce costs \$4.79.
10. Article 5 of the NLCA established a system of Inuit harvesting rights and a wildlife management system for all wildlife in the Nunavut Settlement Area. The Preamble to the NLCA states that one of the specific objectives of the Agreement is "to provide Inuit with wildlife harvesting rights *and rights to participate in decision-making concerning wildlife harvesting.*" (emphasis added)

11. The Nunavut Wildlife Management Board (“NWMB”) was established under the NLCA to be the “main instrument of wildlife management in the Nunavut Settlement Area and the main regulator of access to wildlife” (s. 5.2.3).
12. Decisions made by the NWMB are forwarded to the relevant Minister for acceptance, variance or rejection, pursuant to the scheme detailed in sections 5.3.16 through 5.3.23 of the NLCA.
13. One of the NWMB’s powers is the power to establish or modify levels of total allowable harvest for a stock or population in the Nunavut Settlement Area (ss. 5.2.33(d) and 5.6.16).
14. In exercising its powers, the NLCA provides that the NWMB is to be governed by and subject to “principles of conservation” (s. 5.1.2(g)).
15. The “principles of conservation”, as set out in the NLCA, include “the maintenance of vital, healthy, wildlife populations capable of sustaining harvesting” (s. 5.1.5(c)).
16. In making decisions that affect Inuit harvest levels, both the NWMB and the relevant Minister may restrict Inuit harvest only to the extent necessary to effect a valid conservation purpose (s. 5.3.3).
17. When the NLCA came into force in 1993, some wildlife populations, including narwhal, were already subject to harvesting quotas. For narwhal, DFO had set annual quotas commencing in the 1970s. (The source of this information is an internal report prepared by Pat Hall of DFO entitled “Interim Management Approach for Narwhal in Canada”).

18. With the coming into force of the NLCA in 1993, the then-existing quotas on narwhal were, by virtue of s. 5.6.4 of the NLCA, deemed to have been established by the NWMB and were to remain in place until removed or otherwise modified by the Board.
19. In 1993, annual quotas for narwhal were set out in the *Marine Mammal Regulations SOR/93-56*. Each of 21 Inuit communities in Nunavut was allocated an annual quota. The total quota for Nunavut was 527. (The source of this information is the Hall report referred to above).
20. In the years since 1993, the NWMB has made modest adjustments to the quotas for narwhal. In 1999-2000, the NWMB, with DFO approval, established a "Community-Based Management" pilot program in 5 communities in Nunavut. Under this program, unused quotas were allowed to be carried over from one year to the next. Over the years since 1993, the NWMB has also made adjustments from time to time to the quotas for various communities, all with acceptance by DFO. At the present time, the total number of narwhal that may be lawfully harvested by Nunavut Inuit in the Nunavut Settlement Area is 724. (The source of this information is the Hall report referred to above).
21. Some time during the first week of December, 2010, I received a telephone call from Patrice Simon, an official in the Department of Fisheries and Oceans. He indicated he wanted to give me a "heads up" that NTI would shortly be receiving a letter regarding the export of narwhal products. This was the first notice that I or anyone at NTI had of this matter.
22. A few days after this telephone call, on December 8, 2010, I received an undated letter from Sylvie Lapointe of DFO, a copy of which is attached as Exhibit "B" to this Affidavit. The letter informed NTI that NDFs for export of products from four new narwhal "management units" would not be issued. The new management units, which were unilaterally created by DFO, are Admiralty Inlet, East Baffin Island, Northern Hudson Bay, and Parry Channel/Jones Sound/Smith Sound.

23. Prior to receiving DFO's decision through Ms. Lapointe's letter, there was no consultation whatsoever with NTI about an impending export ban on narwhal products. I have made enquiries of the various Regional Wildlife Organizations, affected Hunters and Trappers Organizations and regional Inuit organizations in Nunavut and my information and belief as a result of those inquiries is that none of those organizations were consulted by DFO or anyone else on behalf of the Crown in advance of DFO's decision.
24. Inuit have always depended on marine mammals, including narwhals, as a primary source of food. Within living memory of many Inuit, thorough knowledge of wildlife in a harsh environment such as the Arctic, could be the difference between life and death. Of necessity, Inuit have always been close and careful observers of wildlife. Through this close observation as well as traditional knowledge passed through generations, Inuit possess a great deal of knowledge about narwhal behavior, population dynamics, geographic distribution, population health, and other matters relevant to management of narwhal populations.
25. Inuit do not reject all knowledge obtained through contemporary scientific approaches. However, Inuit believe that we also have valuable information about narwhal and other arctic animals that is complementary to contemporary science and which ought to contribute to management of wildlife resources that we continue to rely on.
26. On December 14, 2010, NTI received from DFO a copy of the DFO "Evaluation of Narwhal with Respect to Making a CITES Non-Detriment Finding", a copy of which is attached as Exhibit "C" to this Affidavit. No Inuit organizations were consulted in the preparation of this Evaluation. The analysis contained in the Evaluation is based to a substantial degree on new narwhal "management units" that, in turn, are based on 6 so-called "summering stocks". Previously, management of narwhal harvests has been based on 2 well-established populations of narwhals: the Baffin Bay population and the Northern Hudson Bay population.

27. The justification in the Evaluation for analyzing the population of narwhal in terms of these new narwhal “management units” gives no indication of actual local depletions of narwhal, genetic diversity in the new units, actual losses of genetic diversity from the units, or actual risk of any such losses. There are no recent scientific surveys that indicate a reduction in narwhal populations. Because of the failure of DFO to consult, NTI was unable to discuss any of these issues with DFO or to provide input that would have informed DFO’s assessment.
28. As set out in the Evaluation, DFO’s decision to ban exports of narwhal products is based on its own assessment that the existing quotas for several communities exceed DFO’s determination of the total allowable harvest (referred to by DFO as “total allowable landed catch”) for those stocks.
29. The authority to determine the total allowable harvest for narwhal in the Nunavut Settlement Area resides with the NWMB in the first instance. In making that determination, the NWMB is obliged to take conservation into account. At the present time, Nunavut Inuit have a legal right to harvest narwhal in accordance with the quotas for each community that have been set by the Board and accepted by DFO.
30. I am not aware and have received no notice that DFO has applied to the NWMB for a reduction of the existing narwhal quotas for Nunavut communities, which together comprise the total allowable harvest for narwhal.
31. Had NTI been consulted by DFO, we would have used that opportunity to raise and discuss the following matters:
 - Inuit traditional knowledge could contribute to an assessment of the health of narwhal populations and the validity of DFO’s “summering stock” approach;
 - the decision to completely ban the export of narwhal products from the four new “management units” is an attempt to indirectly force a reduction in Inuit

harvesting by impairing the economic value of narwhal that Inuit have a legal right to harvest;

- the determination of total allowable harvest of narwhal is, in first instance, the responsibility of the NWMB;
- DFO is not entitled to usurp the NWMB's role in setting the total allowable harvest;
- It is wrong for DFO to impose a ban on exports as a lever to force the NWMB and Inuit to accept DFO's position on total allowable harvest; and
- Inuit have been deprived of the right to participate in important wildlife management decisions that have a significant adverse impact on them.


32. Had NTI been consulted, we also would have used that opportunity to point out that there were ways in which the interests of Nunavut Inuit could have been accommodated. In particular, we would have pointed out that, even if narwhal harvesting were reduced on the basis of DFO's most pessimistic projections of the allowable harvest, the lawful harvest of narwhal would not be reduced to zero. For example, for the East Baffin management unit, DFO's Evaluation is that the total allowable harvest for the four communities in that management unit should be 122 narwhals per year instead of the current quota of 160 per year. Even though DFO's Evaluation is that 122 narwhals can be harvested on a sustainable basis (a figure that NTI considers too low), DFO's decision nevertheless completely prohibits the export of tusks from the East Baffin management unit.

33. I make this Affidavit in support of this application for judicial review and for no improper purpose.

Sworn before me at
Rankin Inlet
in the Territory of Nunavut,
on February 11, 2011.

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) GABRIEL NIRLUNGAYUK
)

A Commissioner, etc.

Inukshuk Aksalnik 
CFO in/for Nunavut
Exp: August 17, 2013

**This is Exhibit " A " referred to in the affidavit of
Gabriel Nirlungayuk
sworn before me,
this 11 day of February, 2011.**



A Commissioner of Oaths, etc.