

**Annual Report**

**2020-2021**

**Ethics Officer for the Nunavut Public Service**

**Jeffrey Schnoor, Q.C.**

**Ethics Officer**



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## Ethics Officer for the Nunavut Public Service

It is my honour to submit the sixth Annual Report of the Ethics Officer for the Nunavut Public Service, for the period from April 1, 2020 to March 31, 2021.

The Ethics Officer operates under Part 6 of the *Public Service Act*, which came into force on April 1, 2015. I had the honour of being appointed as the first Ethics Officer for a five-year term commencing on January 5, 2015. I was reappointed to a further five-year term in 2020.

As I have in past annual reports, I will:

- Provide an overview of what constitutes wrongdoing and how to make a disclosure
- Describe the protections from reprisal that the Act gives to public servants who make a disclosure of wrongdoing, and
- Provide some statistical information on the number of requests for advice that I received, the number of disclosures of wrongdoing and what became of those disclosures.

I will also repeat comments I have made in the past about amendments that might improve the ability of public servants to bring forward disclosures of wrongdoing.

### How to Disclose Wrongdoing

The role of the Ethics Officer, in a nutshell, is to receive and investigate allegations of wrongdoing in the Nunavut public service. Where wrongdoing is found, he or she makes recommendations to address the wrongdoing. The Ethics

Officer provides a safe method for employees in the Nunavut public service to disclose wrongdoing that comes to their attention and provides assurance to them – and to all Nunavummiut – that those disclosures will be investigated and addressed promptly, fairly and effectively.

Wrongdoing is defined in the *Public Service Act*. It means any of the following conduct by an employee acting in his or her public service capacity:

- (a) contravention of an Act of the Legislative Assembly, the Parliament of Canada or the legislature of a province or territory, or of a regulation made under any such Act;

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(b) failure to comply with applicable directives made by the Minister, the Minister responsible for the Financial Administration Act, or the Financial Management Board with respect to management of the public service or public assets for which the employee is responsible;

(c) misuse of public funds or public property;

(d) gross mismanagement of public property or resources for which the employee is responsible, including an act or omission showing a reckless or willful disregard for the proper management of public property or resources;

(e) harassment or verbal or physical abuse of any person other than an employee or violation of the human or contractual rights of any person providing services to or receiving services or information about services of any kind from a department or public body;

(f) an act or omission that creates a substantial and specific danger to the life, health or safety of persons, to public or private property, or to the natural environment, other than a danger that is inherent in the performance of the duties or functions of an employee;

(g) a serious breach of the Code of Values and Ethics;

(h) any act of reprisal against an employee or other person;

(i) a request, direction or encouragement by a supervisor or senior manager to an employee or by an employee to any other person to commit a wrongdoing set out above.

The *Public Service Act* sets out the process that employees must follow if they wish to disclose possible wrongdoing. They must first make reasonable efforts to report it to appropriate authorities in the public service. This can include:

- their senior manager
- their Deputy Minister or deputy head
- the Deputy Minister of Human Resources
- any other Deputy Minister who they think is appropriate

They can report the wrongdoing to any other person if they have reasonable grounds to believe that doing so is necessary to prevent imminent danger to the life, health or safety of a person or imminent danger to property or the environment.

If, after 30 days of reporting the wrongdoing, they don't think that the authorities in the public service have taken reasonable steps to investigate and correct it, they may then report it to the Ethics Officer. At this point, the Ethics Officer will begin an investigation, usually after making some preliminary inquiries to confirm that the allegations, if proven, would amount to wrongdoing. Alternatively, the Ethics Officer may:

- attempt to resolve the matter informally

- refer the matter to alternative dispute resolution
- after making preliminary inquiries, decide that an investigation is not necessary or appropriate and therefore decline to investigate
- refer the matter to other appropriate authorities.

The Ethics Officer has broad powers to investigate and collect evidence. This includes the power to summon witnesses and require them to give evidence and the power to require documents to be produced. The Ethics Officer may, in the course of an investigation, enter any premises occupied by a department or public body. The Ethics Officer decides whether an investigation will be done in private or in public. A deputy head must cooperate and ensure that his or her employees cooperate in an investigation by the Ethics Officer. Failure to do so is an offence with a fine up to \$10,000. An employee must provide information requested by the Ethics Officer. Failure to do so is an offence with a fine of up to \$5,000.

### **Protection from Reprisal**

It is against the law to penalize a person for making a disclosure of wrongdoing and there can be a fine of up to \$10,000. This is called an act of reprisal and includes any action, threat or attempt to suspend, demote, dismiss, discharge, expel, intimidate, coerce, evict, terminate a contract to which the person is a party without cause, commence legal action against, impose a pecuniary or other penalty on or otherwise discriminate against the person because of a disclosure of wrongdoing by that person or because the person assists in the investigation of a disclosure made by another person.

Employees may file a complaint directly with the Ethics Officer if they believe that they are

<p><b>For More Information:</b></p> <p><a href="https://www.gov.nu.ca/human-resources/information/ethics-officer">https://www.gov.nu.ca/human-resources/information/ethics-officer</a></p>
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the subject of an act of reprisal; there is no requirement that an internal disclosure of the alleged reprisal be made first. The Ethics Officer must then investigate the complaint in the same way that he or she would investigate a disclosure of wrongdoing.

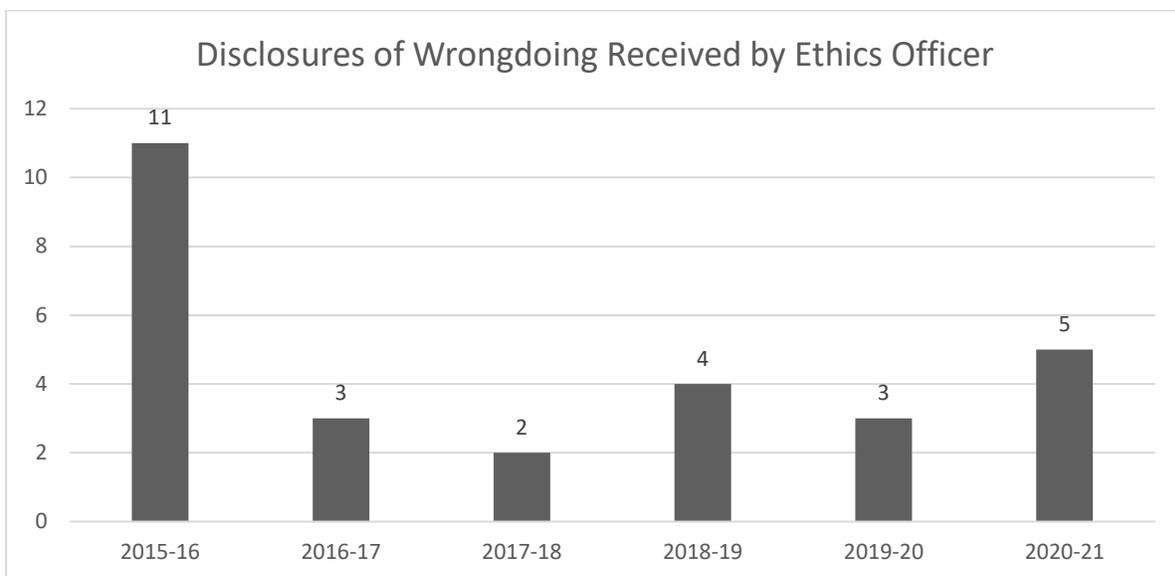
If the Ethics Officer concludes the complaint of reprisal is valid, appropriate disciplinary action must be taken against the person who committed the act of reprisal and other action recommended by the Ethics Officer may be taken to deal with any loss or damage suffered by the person who complained.

Where other actions recommended by the Ethics Officer are not taken, the relevant deputy head and Minister must provide an explanation to the Ethics Officer and must describe what other action, if any, will be taken in response to the recommendations.

## Disclosures and Investigations

As noted above, employees must make an internal disclosure of wrongdoing before they can make a disclosure to the Ethics Officer. Departmental officials notify me of these internal disclosures but I have no jurisdiction to investigate until the disclosure is made to me, after at least 30 days have elapsed. During 2020-21, I received notification of one internal disclosure that did not proceed to a disclosure to the Ethics Officer. This compares with two in 2019-20, four in 2018-19, one in 2017-18, two in 2016-17 and three in 2015-16.

During 2020-21, I received five disclosures of wrongdoing. The following table shows the comparative numbers for past years, going back to 2015-16, the first year in which making a disclosure of wrongdoing to the Ethics Officer was available to Nunavut public servants.



One of the disclosures was investigated and I determined that wrongdoing had not been proven. The following summarizes the case:

An employee of the Nunavut public service (“A”) alleged that they were sexually harassed by another employee holding a superior position (“B”). The alleged incidents occurred more than five years before the submission of the disclosure of alleged wrongdoing. The *Public Service Act* provides that the Ethics Officer may not investigate a matter that is more than five years old unless the Ethics Officer is satisfied that the employee had reasonable grounds to delay making the disclosure, there is a public interest in investigating the matter despite the delay and the persons and information necessary to complete the investigation are still available. I determined that I was satisfied that all three conditions had been met.

The alleged incidents of sexual harassment involved otherwise innocent comments made in a sexually suggestive manner on two occasions. After interviewing A, B and other persons who were present at these incidents, I concluded that it was likely that the conduct of B met the definition of sexual harassment in the Government of Nunavut's Code of Values and Ethics and its *Harassment Free Workplace Policy*. The conduct was unwelcome, the conduct was sexual in nature and the conduct detrimentally affected the work environment.

However, according to *the Public Service Act*, a breach of the Code of Values and Ethics is not sufficient to constitute wrongdoing. Only a "serious breach" meets this threshold. In this case, B's conduct did not involve any physical contact. It was brief and not persistent. It was not repeated in the past five years, even when A and B worked together recently. While I acknowledged the detrimental impact that B's conduct had on A, it was clearly at or near the lowest end of the spectrum of conduct that can constitute sexual harassment. I was therefore unable to conclude that it met the threshold of a serious breach of the Code of Values and Ethics and could not make a finding of wrongdoing within the meaning of Act.

Section 42(1) of the *Public Service Act* sets out circumstances in which the Ethics Officer may decline to investigate a matter. I exercised this discretion in respect of two of the disclosures that I received:

- One disclosure alleged that the employing department had failed to provide the employee with the letter setting out the findings of a fact-finding meeting held as a result of alleged misconduct by the employee. The employee's employment was terminated because of the employee's failure to take the remedial measures set out in that letter. The department stated that the letter had in fact been picked up by the employee. I determined that a failure to provide the letter, if proven, would not constitute wrongdoing, as defined in the *Public Service Act*. Even if the letter had not been provided to the employee, the employee should have taken steps to obtain it and was aware of the consequences of not doing so.

The employee also alleged that, since the termination of employment, they had applied for positions with the Government of Nunavut and had been denied employment each time as a result of racism (specific or systemic). I determined that, at the time of the alleged denials of employment, the individual was not an employee of the Government of Nunavut and I therefore did not have jurisdiction to deal with that allegation.

- The other disclosure was made by a former employee about alleged conduct while they were employed by the Government of Nunavut. The individual alleged that a contract was awarded to a third party under suspicious circumstances. However, no credible evidence was provided and I determined that the allegation was speculative. The individual also made several allegations that their former supervisor had made a number of poor decisions, such as reassigning duties in a poorly considered manner. I determined that, even if proven, such conduct would not constitute wrongdoing. The individual also alleged that an email sent by their supervisor to the individual and all other employees in that office that criticized the individual's conduct constituted the criminal offence of defamatory libel. Although I agreed the

email was inappropriate, there was, in my view, no reasonable prospect that, in the circumstances, such a charge would be laid by a prosecutor. Therefore, the conduct would not constitute wrongdoing.

The final two disclosures were received in March 2021 and have not yet been resolved.

### Reprisals

No allegations of reprisal were received this year.

### Advice

The Ethics Officer is available to provide confidential advice to employees who are considering making a disclosure of wrongdoing. Advice is generally given about whether specific circumstances might constitute wrongdoing and about the process that must be followed to make a disclosure. During 2020-21, I received 26 requests for advice.



## **Some Observations on the Disclosure Process**

Last year, I expressed a concern about an aspect of the *Public Service Act* that, in my view, inhibits employees from disclosing wrongdoing. I will repeat that concern.

As noted earlier in this report, employees must make an initial disclosure to a person in authority within the Government of Nunavut. I believe this is intended to ensure that senior officials remain responsible for their departments or other entities and have the opportunity to make things right. However, my observation is that a number of employees who call me for advice about a possible wrongdoing that, on the face of it, seems credible and concerning do not take the next step and make a formal disclosure. In most cases, this is because of a fear of reprisal. I appreciate that the Act contains robust protections from reprisal, with substantial penalties, but the fact remains that the employees of the Nunavut public service work in small communities and even smaller workplaces. Making a disclosure takes great courage and entails significant risk both in the workplace and in the community.

Most jurisdictions in Canada address this concern by giving employees a choice respecting where they direct their disclosure of wrongdoing. Most jurisdictions allow employees to make an internal disclosure, as is the case in Nunavut, but also allow employees to skip this step and make the disclosure directly to the relevant independent officer (in Nunavut, the Ethics Officer). The independent officer then makes best efforts to protect the identity of the person making the disclosure although, depending on the circumstances, anonymity cannot be guaranteed.

Although I appreciate that this may risk a small increase in frivolous disclosures, I believe that this would be greatly outweighed by the encouragement that would be given to legitimate and serious disclosures. I again suggest that the Legislative Assembly give serious consideration to the merits of such an approach.

I also note that some Canadian jurisdictions allow their equivalent of the Ethics Officer to investigate allegations of wrongdoing within the public service that are made by someone from outside the public service. That is not the case in Nunavut and, when I receive such an inquiry, I am obliged to advise the potential discloser that I have no jurisdiction to look into the matter. I suggest that consideration also be given to the merits of this approach.

## **National Public Interest Disclosure Group**

I would like to again express my appreciation to the members of the National Public Interest Disclosure Group. This informal organization brings together officials from across Canada who have responsibility for public service ethics and whistleblowing. The current pandemic has made our customary annual in-person meetings impossible but the Group continues to be an important forum for education and sharing of experiences.

## **Conclusion**

As I have in the past, I would like to conclude my annual report by expressing my gratitude for the excellent support that I have received over the past year from the senior staff in the Department of Human Resources in carrying out my duties.

Respectfully submitted,

Jeffrey Schnoor, Q.C.  
Ethics Officer