Federal Court  Cour fédérale

Date: 20180427

Docket: T-1479-16

Citation: 2018 FC 453

Vancouver, British Columbia, April 27, 2018

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

MOHAMED KARIM

Plaintiff

and

THE ATTORNEY GENERAL OF CANADA AND KAIROS PNEUMA CHAPLAINCY SERVICES AND FATHER MARK MCGHEE

Defendants

ORDER AND REASONS

I. Overview

[1] The defendants Kairos Pneuma Chaplaincy Services [KPC] and Father Mark McGee [collectively the "moving parties"], bring this motion under Rules 221(1)(a) and (f) of the *Federal Courts Rules*, SOR/98-106, to strike out the claims as against them. They argue the

Court has no jurisdiction over the claims made against them in the action pursuant to section 17 of the *Federal Courts Act*, RSC, 1985, c F-7 [the Act].

[2] For the reasons that follow the motion is dismissed and the moving parties are to respond to the statement of claim within 30 days of the date of this Order.

II. Background

A. *The underlying claim*

[3] The plaintiff, Mohamed Karim, is an offender and inmate who was housed at the Grande Cache Institution, a medium-security facility administered by the Correctional Service of Canada [CSC].

[4] In 2013 a determination was made by CSC officials to transform the model for the provision of Chaplaincy services to federal offenders. CSC initiated a process to identify a single service provider of religious and spiritual services. In April 2014 KPC was awarded a contract by CSC to provide these services in conjunction with CSC; Father McGee was subcontracted by KPC.

[5] The plaintiff alleges harassment and denial of religious freedom. The claims against the moving parties are based on their status as servants or agents of the Crown.

B. *Position of the moving parties, KPC and Father McGee*

[6] The moving parties submit that this Court lacks jurisdiction to hear the claims against them. They further state that the plaintiff's claims are a collateral attack and abuse of process as they have been disposed of by other decision-makers and those determinations have not been challenged in the Courts. They ask that: (1) their names be struck from the style of cause; (2) all references to them as agents of the Crown, as defendants, or to their personal liability be struck from the statement of claim; and (3) all references to discriminatory or alleged discriminatory treatment be struck. In the alternative they seek 30 days from the date of this Order to respond to the statement of claim.

(1) The ITO test is not satisfied

[7] The moving parties submit, relying on the Supreme Court of Canada decision in *ITO-International Terminal Operators v Miida Electronics Inc*, [1986] 1 SCR 752, 28 DLR (4th) 641 [*ITO*] that this Court has jurisdiction only where all three parts of the "ITO Test" have been satisfied: (1) there must be a statutory grant of jurisdiction from Parliament; (2) there must be an existing body of law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction; and (3) the law on which the case is based must be a "law of Canada" as the phrase is used in section 101 of the *Constitution Act, 1867*.

[8] They further submit that the Federal Court's jurisdiction extends to officers, servants or agents of the Crown. They submit they are not officers, servants or agents. Rather they argue services were provided under the terms of a contract for service. The moving parties

acknowledge that the Crown may exercise sufficient control in such circumstances to allow one to conclude a *de jure* Crown-agent relationship exists. However, they submit the moving parties exercised substantial discretion in the delivery of chaplaincy services to CSC and they cannot be said to be Crown agents on the basis of *de jure* control.

[9] The moving parties further argue that the second requirement of the ITO test has not been met. They argue that the claim relies on tort law. They submit there is no federal legislation that expressly confers jurisdiction on the Federal Court to deal with common law torts. Similarly they argue, with respect to the plaintiff's claim for damages through subsection 24(1) of the *Charter*, that absent an external source of jurisdiction the *Charter* does not provide jurisdiction to the Federal Court to grant a Constitutional remedy.

(2) Collateral attack or abuse of process

[10] The moving parties submit the statement of claim indirectly challenges a grievance decision and a Canadian Human Rights Commission decision that arose from the plaintiff's complaints. These decisions have not been challenged under their normal review procedures. They submit that to allow this claim to go forward on these facts would be an abuse of process and a collateral attack on those decisions.

C. *Position of the plaintiff*

[11] The plaintiff submits that the claims may be struck only if they have no reasonable chance of success. They submit that in applying the ITO test, it is not plain and obvious that this

Court lacks jurisdiction as the services the moving parties provide arise from CSC's obligations to inmates under the *Corrections and Correctional Release Act*, SC 1992, c 20 [CCRA] and the *Corrections and Correctional Release Regulations*, SOR/92-620 [CCRR]. They further submit this action is neither a collateral attack nor an abuse of process.

(1) The ITO test is satisfied - the moving parties are servants or agents of the Crown

[12] The plaintiff submits that in performing their duties the moving parties are fulfilling CSC's obligation to allow inmates to participate in and express religious or spiritual beliefs. The CCRA and its regulations impose duties on the moving parties toward inmates to respect all their rights that are not lawfully and necessarily restricted by imprisonment and to be familiar with all of the CSC's policies relating to their duties. The CCRR also contemplate that inmates will seek civil remedies against CSC staff in addition to any grievance process available to them.

[13] The plaintiff argues the moving parties are delegates of CSC and either servants of the Crown or through the exercise of *de jure* control are agents of the Crown. They state that despite any professional authority the moving parties may have in respect of the delivery of religious services they remained subject to significant CSC control. They submit the three-part ITO test is satisfied and there is jurisdiction for the purpose section 17(5)(b) of the Act. Furthermore, the plaintiff submits the *Charter* applies as the moving parties' activities are clearly governmental in nature.

(2) Collateral attack or abuse of process

[14] The plaintiff states there is no evidence before this Court to demonstrate that decisions have been made in respect of the complaints underpinning this claim by other bodies. They further state that section 81 of the CCRR permits inmates to commence legal proceedings in addition to pursuing complaints within the grievance process. The plaintiff submits there is no abuse of process.

D. *Position of the defendant, the Attorney General of Canada*

[15] The Attorney General takes the position that this Court does not have jurisdiction as the first part of the ITO test has not been met. The Attorney General also takes the position that there is an absence of evidence before the Court to allow it to address the moving parties' submissions that the underlying action is a collateral attack or abuse of process.

(1) The ITO test is not satisfied - the moving parties are not servants or agents of the Crown

[16] The Attorney General takes the position that there is a sufficient federal law component to the plaintiff's claims to nourish and support the grant of federal jurisdiction as set out in the ITO test. The Federal Courts can deal with common law torts which are based on or informed by federal law and where there exists a detailed statutory framework. However, the Attorney General submits that there is no statutory grant of jurisdiction by Parliament because the moving parties are neither agents nor servants of the Crown as required by paragraph 17(5)(b) of the Act.

[17] The Attorney General states that to be characterized as agents of the Crown it must be demonstrated that: (1) Parliament legislated the moving parties as agents; or (2) the Crown exercises *de jure* control over the moving parties. In this case the Attorney General submits only the second option is open to argument.

[18] The Attorney General acknowledges the Crown's contractual relationship with KPC, but submits the Crown does not exercise control over how KPC fulfils its obligations. Under the contract CSC's role in supervising or controlling KPC is limited to providing (1) a space for worship within the institution, (2) workspace and a computer terminal for chaplains, and (3) access to all parts of the institution in which the chaplains must exercise ministry. The Crown does not exert substantial control over KPC and as such is not in *de jure* control.

[19] The Attorney General further submits that Father McGee is a subcontractor of KPC. Father McGee and the Crown are not in a contractual relationship and therefore the claim that he is an agent of the Crown cannot succeed.

(2) Collateral attack or abuse of process

[20] The Attorney General notes that a collateral attack is an attempt to nullify a decision without going through the proper appeal process and an abuse of process in an attempt to re-litigate the same issues and thereby invite inconsistent decisions. The Attorney General submits that to find either would require this Court to delve into the substance of this case.

III. The Law

(1) Motion to Strike

[21] Rule 221(a) and (f) governs the moving parties' motion to strike:

221 (1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it	221 (1) À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas :
(a) discloses no reasonable cause of action or defence, as the case may be	a) qu'il ne révèle aucune cause d'action ou de défense valable;
…	…
(f) is otherwise an abuse of the process of the Court	f) qu'il constitue autrement un abus de procédure.
and may order the action be dismissed or judgment entered accordingly.	Elle peut aussi ordonner que l'action soit rejetée ou qu'un jugement soit enregistré en conséquence.

[22] The Supreme Court of Canada has set out the test to be applied on a motion to strike for failing to disclose a reasonable cause of action: "[a] claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action." (*Knight v Imperial Tobacco Canada*, 2011 SCC 42 at para 17 citing *Hunt v Carey Canada Inc.*, 2 SCR 959 [*Knight*]). The test to be applied is not in dispute.

[23] In this case the moving parties' claim that the pleadings fail to disclose a reasonable cause of action is based on a lack of jurisdiction. Where a motion to strike challenges this Court's jurisdiction, the Court must determine whether the pleadings or affidavits filed on the motion establish that "there are jurisdictional facts or allegations of such facts supporting an attribution of jurisdiction." (*Mil Davie Inc. v Société d'Exploitation et de Développement d'Hibernia Ltée* (1998), 226 NR 369 at para 8, 85 CPR (3d) 320 (FCA).

[24] To be clear, my task is not to determine whether the Court does or does not have jurisdiction over the matter. Rather, at this preliminary stage in the proceeding, the plaintiff's claims are to be struck only if it is plain and obvious that the Court lacks jurisdiction.

(2) The test for Federal Court jurisdiction

[25] The Parties agree that the appropriate test to determine whether the Federal Court has jurisdiction over a matter is as articulated by the Supreme Court of Canada in *ITO*:

1. There must be a statutory grant of jurisdiction by Parliament.
2. There must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction.
3. The law on which the case is based must be "a law of Canada" as the phrase is used in section 101 of the *Constitution Act, 1867*.

[26] The Federal Court has jurisdiction over a matter only where all three steps of the test are satisfied. Consequently, if the moving parties demonstrate that the claim plainly and obviously fails to satisfy any one step, the plaintiff's claim as against them will be struck.

[27] The Supreme Court of Canada recently considered the ITO test in *City of Windsor v Canadian Transit Co*, 2016 SCC 54 [*City of Windsor*]. *City of Windsor* involved a dispute over a number of vacant properties owned by Canadian Transit Company, which also owns and operates the Canadian half of the Ambassador Bridge. The vacant properties were in a state of disrepair and the City of Windsor issued orders to repair. The Canadian Transit Company sought a declaration that as the properties related to a federal undertaking, the Ambassador Bridge, the Canadian Transit Company was not subject to municipal by-laws. The City of Windsor moved to strike.

[28] The question of jurisdiction in *City of Windsor* arose in the context of section 23 of the Act, which provides that the Federal Court has jurisdiction where " … a claim for relief is made or a remedy is sought under an Act of Parliament or otherwise…". Justice Karakatsanis, writing for the majority states the following at paragraphs 25 through 27:

> [25] In order to decide whether the Federal Court has jurisdiction over a claim, it is necessary to determine the essential nature or character of that claim (*JP Morgan Asset Management (Canada) Inc. v. Canada (National Revenue)*, 2013 FCA 250, [2014] 2 F.C.R. 557, at para. 50; *Sifto Canada Corp. v. Minister of National Revenue*, 2014 FCA 140, 461 N.R. 184, at para. 25). As discussed in further detail below, s. 23(c) of the *Federal Courts Act* only grants jurisdiction to the Federal Court when a claim for relief has been made, or a remedy has been sought, "under an Act of Parliament or otherwise". The conferral of jurisdiction depends on the nature of the claim or remedy sought. Determining the claim's essential nature allows the court to assess whether it falls within the scope of s. 23(c). Jurisdiction is not assessed in a piecemeal or issue-by-issue fashion.
>
> [26] The essential nature of the claim must be determined on "a realistic appreciation of the practical result sought by the claimant" (*Domtar Inc. v. Canada (Attorney General)*, 2009 FCA 218, 392 N.R. 200, at para. 28, per Sharlow J.A.). The "statement of claim is not to be blindly read at its face meaning" (*Roitman v. Canada*, 2006 FCA 266, 353 N.R. 75, at para. 16, per Décary J.A.). Rather,

> the court must "look beyond the words used, the facts alleged and the remedy sought and ensure . . . that the statement of claim is not a disguised attempt to reach before the Federal Court a result otherwise unreachable in that Court" (*ibid.*; see also *Canadian Pacific Railway v. R.*, 2013 FC 161, [2014] 1 C.T.C. 223, at para. 36; *Verdicchio v. R.*, 2010 FC 117, [2010] 3 C.T.C. 80, at para. 24).
>
> [27] On the other hand, genuine strategic choices should not be maligned as artful pleading. The question is whether the court has jurisdiction over the particular claim the claimant has chosen to bring, not a similar claim the respondent says the claimant really ought, for one reason or another, to have brought.

[29] The parties did not address *City of Windsor* in their original submissions. Further written submissions were requested and provided.

IV. Issues:

[30] The Motion raises the following issues:

A. Is it plain and obvious that the Federal Court lacks jurisdiction over the claim against the moving parties? This issue raises two sub-issues:

   i. In considering the issue of jurisdiction is it necessary to first characterize the essential nature of the claim?

   ii. Is it plain and obvious that the claim against the moving parties fails to satisfy the ITO test?

B. Does the action amount to a collateral attack or abuse of process?

V. Analysis

A. *Does the Federal Court have jurisdiction over the claim against the moving parties?*

(1) Is it necessary to first characterize the essential nature of the claim?

[31] The moving parties submit that *City of Windsor* modifies the ITO test by mandating, as a preliminary step, the requirement to characterize the essential nature of the claim prior to turning to the three-part ITO test. They submit this preliminary requirement is not restricted to claims of jurisdiction under section 23 of the Act, relying on recent decisions of this Court in *Apotex Inc v Ambrose*, 2017 FC 487 [*Ambrose*] and *744185 Ontario Incorporated v Canada (Transport)*, 2017 FC 764 [*744185*].

[32] The plaintiff submits that it is unclear whether the requirement to characterize the essential nature of the claim adds, in any significant way to the ITO analysis in this case. The Attorney General takes the position that unlike the situation in *City of Windsor* where the Court interpreted paragraph 23(c) of the Act, here the court is interpreting paragraph 17(5)(b). The Attorney General submits the reasoning in *City of Windsor* is not directly relevant to a determination of whether the plaintiff has met the ITO test requirements in respect of the moving parties.

[33] *Ambrose* involved a motion to strike an action against individually named defendants who played a role in prohibiting the sale of drug products in Canada and who made public statements allegedly defaming Apotex. The question before the Court on the motion to strike was

whether the Federal Court had jurisdiction over the claims against the individuals. In *Ambrose* the parties agreed that paragraph 17(5)(b) of the Act created a specific statutory grant of jurisdiction satisfying the first part of the ITO test.

[34] In *Ambrose* Justice Michael Manson addressed the need to characterize the essential nature of the claim before turning to the ITO test where the action arises under paragraph 17(5)(b). After citing the majority decision in *City of Windsor* Justice Manson concluded at para 48 that *City of Windsor* did mandate the characterization of the essential nature of the claim for the purpose of "identifying the material facts needed to assess whether the claim falls within the statutory grant of jurisdiction identified in the first step of the ITO test."

[35] As noted above, *City of Windsor* involved the consideration of section 23 of the Act which provides that the Federal Court has jurisdiction in cases where relief is sought "under an Act of Parliament or otherwise." It was in interpreting these words that the majority concluded the right to seek relief must arise directly from federal law, not in relation to federal law. No such limitation exists in paragraph 17(5)(b) of the Act (*Ambrose* at para 50).

[36] That the Federal Court has the statutory authority to adjudicate claims in tort which are properly before the Court under section 17 of the Act is also not disputed. Where a claim in tort properly falls within the scope of section 17, that section creates a shared jurisdiction as between the Federal Court and the provincial courts, providing a plaintiff with a choice of forum (*Ambrose* at paras 52, 53 and 57 citing *Canada (AG) v Telezone Inc*, 2010 SCC 62 at paras 58 and 59).

[37] I therefore agree with and adopt Justice Manson's conclusion in *Ambrose*: where this Court's jurisdiction is rooted in section 17 of the Act *City of Windsor* mandates the characterization of the essential nature of the claim for the purpose of "identifying the material facts needed to assess whether the claim falls within the statutory grant of jurisdiction identified in the first step of the ITO test."

(a) *What is the essential nature of the claim*

[38] In assessing the essential nature of the claim a court must have "a realistic appreciation of the practical result sought by the claimant" (*City of Windsor* at para 26, citing *Domtar Inc v Canada (Attorney General)*, 2009 FCA 218, 392 NR 200, at para 28, per Sharlow J.A.). The moving parties submit that the essential nature of the claim against them is "negligence and intentional malicious conduct" as against Father McGee, and of vicarious liability on the part of KPC. While I do not disagree with that statement as far as it goes, it is incomplete. I would characterize the claim against them as one of negligence and intentional malicious conduct arising from their duties as agents of the Crown.

[39] Paragraph 3 of the statement of claim alleges that the moving parties are servants or agents of the Crown. The necessary jurisdictional fact has been pled to place the moving parties within the scope of the statutory grant of jurisdiction in paragraph 17(5)(b). Having reviewed the statement of claim and having considered the practical result sought by the plaintiff, the essential nature of the claim involves allegations of negligent actions or intentional wrongdoing on the part of Crown servants or agents in the performance of their duties as defined in federal legislation and regulations.

(2) Has the ITO test plainly and obviously not been satisfied?

(a) *Step one: Is there a statutory grant of jurisdiction?*

(i) Are the moving parties agents of the Crown?

[40] In submissions the status of the moving parties as either officers or servants of the Crown was not seriously pursued. The issue is whether they are agents of the Crown for the purposes of paragraph 17(5)(b) of the Act.

[41] As mentioned above, the statement of claim alleges that the moving parties are agents of the Crown. In a motion to strike I am to assume the facts pleaded to be true (*Knight* at para 17). Nevertheless, the moving parties ask the Court to strike the pleadings on the basis that they are not agents of the Crown.

[42] Determining that the moving parties are not agents of the Crown contrary to the plaintiff's pleadings is not a straightforward proposition. It involves an extensive review of the record. The parties have identified a number of relevant considerations:

A. An entity may become an agent of the Crown where (1) Parliament has expressly legislated it to be an agent, or (2) where the Crown exercises sufficient control that it can said be the Crown is in *de jure* control of the entity.

B. In this case the moving parties have not been legislated as agents, so the Court would have to decide whether the Crown is in *de jure* control. This means a careful examination of the relationship between the Crown and the entity is required (*Nova Scotia Power Inc v Canada,* 2004 SCC 51 at paras 12 and 13). The greater the control the more likely it becomes that the entity will be seen as an agent of the Crown. The examination of the relationship is not focused on how much independence the entity has in fact but rather is focused on how much independence can be asserted by the entity based on the terms or arrangement between the Crown and the entity (*R v Eldorado Nuclear Ltd; R v Uranium Canada Ltd,* [1983] 2 SCR 551, 4 DLR (4th) 193 at 42 [*Eldorado*]).

C. Determining the degree of control that is available to be exercised under the terms of the relationship as between the Crown and the other party involves examining legislative and regulatory requirements.

[43] In this circumstance section 75 of the CCRA requires CSC to provide support and services to all federal offenders of all religious backgrounds:

75. An inmate is entitled to reasonable opportunities to freely and openly participate in, and express, religion or spirituality, subject to such reasonable limits as are prescribed for protecting the security of the	75 Dans les limites raisonnables fixées par règlement pour assurer la sécurité de quiconque ou du pénitencier, tout détenu doit avoir la possibilité de pratiquer librement sa religion et

penitentiary or the safety of persons.	d'exprimer sa spiritualité.

[44] Sections 100 and 101 of the CCRR further describe CSC's responsibilities and obligations in relation to the provision of religious and spiritual services to inmates:

100 (1) Every inmate shall be entitled to express the inmate's religion or spirituality in accordance with section 75 of the Act to the extent that the expression of the inmate's religion or spirituality does not	**100 (1)** Tout détenu a droit de pratiquer sa religion ou sa vie spirituelle conformément à l'article 75 de la Loi, dans la mesure où cette pratique ou cette vie spirituelle :
(a) jeopardize the security of the penitentiary or the safety of any person; or	**a)** ne compromet pas la sécurité du pénitencier ou de quiconque;
(b) involve contraband.	**b)** ne comporte pas d'objets interdits.
(2) Sections 98 and 99 apply in respect of any assembly of inmates held for the purpose of expressing a religion or spirituality.	**(2)** Les articles 98 et 99 s'appliquent à toute réunion de détenus ayant pour objet la pratique de la religion ou de vie spirituelle.
101 The Service shall ensure that, where practicable, the necessities that are not contraband and that are reasonably required by an inmate	**101** Dans la mesure du possible, le Service doit veiller à ce que soit mis à la disposition du détenu, exception faite des objets interdits, ce qui est raisonnablement

for the inmate's religion or spirituality are made available to the inmate, including	nécessaire pour sa religion ou sa vie spirituelle, y compris :
(a) interfaith chaplaincy services;	**a)** un service d'aumônerie interconfessionnel;
(b) facilities for the expression of the religion or spirituality;	**b)** des locaux pour la pratique religieuse ou la vie spirituelle;
(c) a special diet as required by the inmate's religious or spiritual tenets; and	**c)** le régime alimentaire particulier imposé par la religion ou la vie spirituelle du détenu;
(d) the necessities related to special religious or spiritual rites of the inmate.	**d)** ce qui est nécessaire pour les rites religieux ou spirituels particuliers du détenu.

[45] Parliament has placed the responsibility to provide inmates with a reasonable opportunity to practice their religious beliefs on CSC, not KPC. It is not at all obvious that this responsibility can be contracted to a third party. I recognize that professional service providers will generally require significant professional control over the content of services delivered, but one must ask if professional control equates to the absence of *de jure* control over the delivery of legislatively mandated services.

[46] The Statement of Work [SOW] included in the moving parties' motion record outlines CSC's responsibilities to provide religious and spiritual services under the heading "Background" and then states:

> In 2013 a determination was made by CSC officials to transform the existing model of provision of Chaplaincy services to that of a single service provider who will provide all religious and spiritual services in conjunction with CSC

[47] The SOW does not signal a relinquishment of control or responsibility over the provision of religious and spiritual services, rather it points to the implementation of a different delivery model. The SOW is over 5 pages in length. It describes hours to be worked, services to be delivered including the provision of resources for specific religious and spiritual services at the direction of the "Project Authority". It directs what must be provided in areas of worship, education, community involvement, and chaplaincy integration with CSC staff management processes. It directs that those providing chaplaincy services shall have a visible presence both within and outside of CSC institutions. It also dictates the minimum qualification of those providing chaplaincy services. Work space and computer terminals are provided by CSC and service delivery is driven by institutional schedules and security requirements. The SOW does not clearly signal a surrender of control by CSC over the provision of religious and spiritual services.

[48] The moving parties point to a variety of factors within the framework of the contractual relations between CSC and KPC to support the view that CSC does not exercise *de jure* control. These include:

A. There were no contract negotiations between KPC and the Crown prior to entering into the contract for the provision of Chaplaincy services nor was there discussion on how to implement those services;

B. By the terms of the contract KPC was to adhere to a professional code of conduct for CSC chaplains but no such code was provided by CSC or Public Works and Government Services Canada;

C. The contract provided for quarterly meetings between CSC and KPC however only two such meeting occurred between 2014 and 2016;

D. KPC hired all contract chaplains directly pursuant to individual employment agreements and KPC understood it to be responsible for giving direction to its employees and KPC implemented a reporting structure that required comments relating to regional chaplaincy services to be reported to KPC's president who in turn would report to the KPC regional manager to allow any issues to be dealt with;

E. CSC took the position that pursuant to the contractual relationship with KPC only time worked would be compensated, and professional development was not to be billed;

F. CSC only required that KPC employees provide a monthly statistical accounting of their responsibilities which were provided to CSC through KPC's regional managers with monthly invoices.

[49] The moving parties submit that the absence of contract negotiations and CSC's failure to exercise certain authorities under the terms of their relationship supports the view that there is an absence of *de jure* control. I disagree. The imposition of terms absent a negotiation is at best a neutral factor and, as noted above, *de jure* control is to be considered on the basis of the degree

of control available pursuant to the terms of the relationship not a consideration of actual independence (*Eldorado*).

[50] The Attorney General has stated in written submission that Father McGee is not in a contractual relationship with the Crown and is therefore excluded from consideration as a Crown agent. The Attorney General cites no authority for this proposition. Nor have the moving parties taken the position that Father McGee might be viewed differently than KPC.

[51] In sum, it is neither plain nor obvious on the basis of the evidence before me that the moving parties are not agents of the Crown.

(ii) Conclusion on step one of the ITO Test

[52] The moving parties have not shown that the claim fails to satisfy step one of the ITO test. The plaintiff pleaded—and the moving parties have not demonstrated that the pleading is plainly and obviously false—that the moving parties are Crown agents for the purposes of paragraph 17(5)(b) of the Act.

(b) *Step two: Is there an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction?*

[53] The moving parties argue that no federal legislation confers on the Federal Court the jurisdiction to deal with common law torts. They argue the mere fact that a tort has occurred in a

federal penal institution is not sufficient to find the required body of federal law to nourish the grant of jurisdiction.

[54] The absence of an express conferral of jurisdiction is not determinative of the second step of the ITO test where in pith and substance the issues raised are based upon or informed by federal law (*Peter G White Management Ltd v Canada (Minister of Canadian Heritage)*, 2006 FCA 190 [*Peter G White*]). The moving parties seek to distinguish this matter from *Ambrose*, *Peter G White* and *744185* on the basis that those claims related to actions governed by detailed federal regulatory schemes. In my view such a distinction does not arise. The very rights in issue here are set out in federal legislation and regulations.

[55] The moving parties rely on *Robinson v Canada*, [1996] 2 FC 624, 110 FTR 271 (TD), [*Robinson*] and urge the Court to adopt the view expressed in that case; the regulatory framework in issue did not nourish the grant of jurisdiction because it was aimed at establishing duties for corrections employees rather than creating rights for inmates. I decline to do so as *Robinson* is readily distinguishable. First *Robinson* dealt with the former *Penitentiary Act* and its regulations, not the CCRA. Secondly, the issues raised here relate to the plaintiff's individual right to practice his religion and spirituality, which is specifically provided for in the CCRA and CCRRs. Section 75 of the CCRA and sections 101 and 102 of the CCRRs address these rights in a substantive manner. In this case the legislative and regulatory framework will be essential in framing and determining the claims advanced by the plaintiff, including the alleged breaches of the *Charter*. The claim involves an alleged breach of express rights.

[56] It is not plain and obvious that the claim fails to satisfy the second step of the ITO test.

(c) *Step three: Is the law on which the case is based "a law of Canada" as the phrase is used in section 101 of the Constitution Act, 1867?*

[57] I am of the opinion that the CCRA in conjunction with the CCRRs are essential to the disposition of the case and nourish the statutory grant of jurisdiction. Step three of the ITO test requires that I consider whether the CCRA and CCRRs are valid federal law. This question is not disputed. The third step of the ITO test is satisfied.

[58] Based on the above it is neither plain nor obvious that the Federal Court lacks jurisdiction to hear and decide the claims against the moving parties.

B. *Does the action amount to a collateral attack or abuse of process?*

[59] There is no evidence in the motion record as to what (if any) conclusions the Canadian Human Rights Commission reached or what became of the plaintiff's complaint under the offender grievance process. The moving parties' characterization of the plaintiff's claim as a collateral attack or an abuse of process is unsubstantiated. This Court cannot strike a party's pleadings on the basis of a bald assertion.

VI. Costs

[60] The plaintiff seeks and shall have costs in any event of the cause.

ORDER in T-1479-16

THIS COURT ORDERS that:

1. The motion is dismissed.
2. The moving parties are to respond to the statement of claim within 30 days of the date of this order.
3. Costs to the plaintiff in any event of the cause.

"Patrick Gleeson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1479-16
STYLE OF CAUSE:	MOHAMED KARIM v THE ATTORNEY GENERAL OF CANADA AND KAIROS PNEUMA CHAPLAINCY SERVICES AND FATHER MARK MCGHEE
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	NOVEMBER 14, 2017
ORDER AND REASONS:	GLEESON J.
DATED:	APRIL 27, 2018

APPEARANCES:

J. Todd Sloan	FOR THE PLAINTIFF
Patrick Bendin	FOR THE DEFENDANT THE ATTORNEY GENERAL OF CANADA
George G. Vuicic Anne Lemay	FOR THE DEFENDANTS KAIROS PNEUMA CHAPLAINCY SERVICES AND FATHER MARK MCGEE

SOLICITORS OF RECORD:

J. Todd Sloan Barrister and Solicitor Kanata, Ontario	FOR THE PLAINTIFF
Attorney General of Canada Ottawa, Ontario	FOR THE DEFENDANT THE ATTORNEY GENERAL OF CANADA
Hicks Morley Hamilton Stewart Storie LLP Ottawa, Ontario	FOR THE DEFENDANTS KAIROS PNEUMA CHAPLAINCY SERVICES AND FATHER MARK MCGEE