



## In for the long haul

*Nathan Whitling has fought long and hard, but justice remains elusive for Omar Khadr.*

By Susan Goldberg

It's been a roller coaster of a summer for Nathan Whitling, and the Edmonton lawyer doesn't expect to be on steady ground anytime soon.

For the past seven years, Whitling has been defending Omar Khadr, the 15-year-old Canadian captured in Afghanistan in 2002, accused of killing an American soldier. Since the fall of that year, Khadr, now

says Whitling. "I had my suitcase packed and was ready to leave for Cuba when all of a sudden Jon had his collapse and the air came out of the balloon. It was a bit of a stressful situation."

Not that things are set to get any less stressful once the trial resumes, expected in October as *National* went to press. Whitling and Dennis Edney, the other half of

23, has been held in the United States' military detention centre in Guantánamo Bay, Cuba. Despite accusations that he was mistreated there, and despite Whitling's successful argument before the Supreme Court in 2009 that Khadr's Charter rights had been violated, the Canadian government has so far refused to repatriate him.

**"The single most shocking thing... was to learn that all this abuse really happened."**

— Nathan Whitling

The CBA has advocated for the repatriation of Khadr since 2007. It was granted intervenor status in the appeal before the Supreme Court; the court held that the government infringed Khadr's section 7 rights by interrogating him when it knew of his mistreatment, and providing the fruits of the investigation to U.S. officials.

In July, the Federal Court of Appeal reversed an earlier Federal Court decision requiring the Canadian government to come up with a list of remedies to its breach of Khadr's constitutional rights. Khadr's trial, in a U.S. military court, was scheduled to begin — finally — in August; it was further delayed after his Pentagon-appointed lawyer, Lieutenant-Colonel Jon Jackson, collapsed unexpectedly during the first day of witness cross-examination.

"We'd reached a very tense point in the Guantánamo trial,"

# Là pour rester

L'affaire Omar Khadr s'éternise depuis sept ans. Mais Nathan Whitling connaît les dossiers de longue haleine.

**L**'été a été chargé pour Nathan Whitling, et il ne s'attend pas à ce que les choses se calment d'ici peu. Surtout que, au moment d'aller sous presse, la date de la reprise du procès d'Omar Khadr à Guantanamo avait été fixée au 18 octobre, selon les dires du Pentagone américain.

Depuis sept ans, M<sup>e</sup> Whitling et Dennis Edney sont les avocats canadiens d'Omar Khadr, ce Canadien qui, à 15 ans, a été capturé en Afghanistan en 2002, et accusé d'avoir tué un soldat américain. Aujourd'hui âgé de 23 ans, il demeure détenu à Guantanamo Bay.

Le procès avait commencé au mois d'août mais a dû être retardé pour une énième fois lorsque, la première journée d'audience, l'avocat américain de la défense, le lieutenant-colonel Jon Jackson, s'était effondré alors qu'il interrogeait un témoin de la poursuite.

Force est de constater que le dossier Khadr est une odyssée légale et internationale qui a emmené M<sup>e</sup> Whitling, 39 ans, devant 10 tribunaux différents, incluant les cours suprêmes du Canada, où il est parvenu à faire reconnaître que les droits fondamentaux de son client étaient violés, et

des États-Unis.

Nathan Whitling représente aussi le frère d'Omar Khadr, Abdullah, qui a réussi à faire rejeter une demande d'extradition des États-Unis, qui l'accusent de crimes liés au terrorisme qui auraient été commis depuis sa cellule, à Toronto.

Ces dossiers représentent un véritable rêve pour à peu près n'importe quel étudiant en droit un peu idéaliste. Et ils étaient très certainement le type de dossiers qui l'intéressaient lorsqu'il était clerk pour le juge de la Cour suprême du Canada, John Major, en 1999-2000. « Je me disais que ce serait vraiment bien de travailler sur certains de ces gros dossiers qui font évoluer le droit et qui ont un impact sur le pays », se souvient l'avocat.

Maintenant associé chez Parlee McLaws LLP, un cabinet avec une pratique de litige diversifiée qui touche aussi bien le droit autochtone que le droit commercial, M<sup>e</sup> Whitling n'en est pas à ses premières armes dans ces affaires d'envergure. En 2002, il s'était rendu en Cour suprême dans *R. c. Neil*, une histoire de conflits d'intérêts entre avocats. Il a aussi travaillé dans le dossier historique *Chief Victor Buffalo c. Canada*, qui a finalement été entendu en 2008.

C'est ce désir de travailler sur de tels dossiers, sans pour autant en retirer un avantage financier, qui l'a amené dans le giron de Dennis Edney, qui cherchait quelqu'un pour l'épauler dans la cause de Khadr. « Je souhaitais trouver quelqu'un avec les compétences intellectuelles nécessaires pour entreprendre un tel défi, alors qu'on affronte un gouvernement. Il me fallait quelqu'un d'intègre, quelqu'un qui m'inspirait la confiance, et qui était davantage intéressé par la qualité du dossier que par la rétribution financière, » affirme M<sup>e</sup> Edney. « Nate correspondait parfaitement à ce profil. »

Malgré tout, Nathan Whitling résiste à la tentation de fanfaronner ses accomplissements, lui qui se décrit comme une personne plutôt monotone. Tout comme il évite les questions qui touchent sa vie personnelle — si, par exemple, le fait qu'il soit père de quatre enfants et que sa femme soit aussi avocate influence sa manière de voir les choses. « Le travail, c'est le travail et la famille, c'est la famille », dit-il.

Et sans surprise, il diminue l'importance de son propre rôle dans l'affaire Khadr. Quand ce sera terminé, il continuera tout simplement à faire son « travail normal », à aller reconduire ses enfants aux cours de gymnastique ou au soccer. Mais une chose est certaine. Il restera à l'affût de sa prochaine cause où les droits de la personne seront en jeu. **N**

Khadr's legal defence team, aren't hopeful about Omar's fate. "He's facing a life sentence. And it's not clear where he would serve it."

The Khadr case is an ongoing, groundbreaking, international legal odyssey that has taken Whitling, 39, through 10 different courts, including the supreme courts of Canada and the United States, in a test of the U.S. "war on terror." It raises the spectre of torture, the use of child soldiers, and, in Canada, "the question of whether we're going to suspend our core principles and our constitutional rights in reaction to 9/11," says Whitling, who says that the big question for Canadians is what our government officials are allowed to do when they leave the country: "Does the Charter apply to them? Can someone outside Canada seek the protection of the Charter and any other aspects of Canadian law? If the Canadian government breaches the Charter outside Canada, what kind of remedies does the person whose rights have been violated obtain?"

The questions aren't simply academic: In 2003 and 2004, it would be revealed, Canadian officials interrogated a lawyerless Khadr — with the knowledge that he had been subject to sleep deprivation and isolation — to gather intelligence and extract exculpatory statements that would later be handed over to the U.S. to be used as evidence against the youth. Whitling and Edney's motion to suppress those statements was struck down this summer by military judge Colonel Patrick

Parrish, who will hear the case. Whitling wasn't surprised by the decision: "It's a kangaroo court. It's biased. It relies on inadmissible evidence." Khadr's trial, he says, will ultimately be a painful experience: "Whatever verdict comes out of there is not going to be worthy of a great deal of respect."

A decision much more worthy of Whitling's respect was that of Mr. Justice Christopher Speyer of the Ontario Superior

**"I was looking for someone with integrity, someone I trusted, who's more interested in a good case than financial reward. Nate fits that bill."**

— Dennis Edney

Court, who in August ordered a stay of extradition for Omar's older brother — and Whitling and Edney's client — Abdullah. Ottawa had fought to send the 29-year-old to the United States, where he is accused of supplying weapons to Al Qaeda in Afghanistan. Justice Speyer, however, ruled that self-incriminatory statements made by the older Khadr, also in the absence of a lawyer, to RCMP, CSIS, FBI, and CIA agents in Pakistan were gathered in such a legally dubious situation that they could not be trusted. "It's a pretty important, courageous decision," says Whitling. "It says that the U.S. government has to obey the rule of law."

\*Try 3 for FREE @ writetest.ca

\*While supplies last. Limit 1 offer per mailing address. Ink colour may differ than as shown.

Sharpie

Paper Mate

Paper Mate

Liquid Paper

EXPO

uni-ball



BASICS

©Newell Rubbermaid Office Products

In short, the Khadr cases are pretty much the stuff of dreams for idealistic law students. They are a chance to — against great odds and, possibly, public opinion — make a difference. Certainly, says Whitling, they are the kinds of case he was attracted to when he clerked for the Honourable John Major at the Supreme Court in 1999–2000: “I immediately thought it would be really great to work on some of these big cases that changed the law and make a big impact on the country.”

Not that Whitling, now a partner at Parlee McLaws LLP, with a diverse commercial and aboriginal litigation practice, was a stranger to the Supreme Court before Khadr. In 2002, he acted as lead counsel in yet another landmark case, *R. v. Neil*, on conflicts of interest among lawyers. He also spent many years litigating the historic aboriginal law and treaty case, *Chief Victor Buffalo v. Canada*, heard before the Supreme Court in 2008.

That desire to make an impact — without much chance of financial remuneration — was what drew Edney to ask Whitling to work with him on the Khadr cases in the first place. “I was looking for someone with the intellectual ability to take on a case of this nature, where we are taking on a government. I was looking for someone with integrity, someone I trusted, who’s more interested in a good case than financial reward,” says Edney. “Nate fits that bill. He fits to a T the profile of what all lawyers should be. What is it that distinguishes us? It’s our commitment to the law.”

Whitling, however, balks at attempts to romanticize his work, or to make it personal. Stuff of dreams? “It’s true, in a sense,” he says, finally. “I suppose. But I’m kind of a colourless, boring person. So, I don’t generally speak in those terms. If someone who knows me were to read that they’d say, ‘Nate didn’t say that.’”

It’s true that Whitling is — and has been characterized repeatedly in the media as — the quiet introvert in contrast to Edney’s more colourful, dramatic personality. But listen closely and you’ll pick up on an acerbic wit to go with Whitling’s precise, considered delivery. “We both think outside the box,” says Edney, “but when I think too far outside the box, Nate tempers that with his more reasoned perspective.”

Whitling also shrugs off questions about his personal investment in the

Khadr cases, or his wider human-rights work — whether, perhaps, his experiences as a father of four young children (with his wife, Kristen, a fellow lawyer, he’s parent to Josh, Cassidy, Lauren, and Ethan) might influence his perspective. “Work is work and family is family,” he says. “I tend to keep my personal life separate from the practice.”

Still, Whitling admits to being “stunned” at the extent to which Canada misled the public regarding its involvement in the Khadr case and the conditions under which the youth was held. “The single most shocking thing... was to learn that all this abuse really happened” — despite assurances to the contrary from Ottawa: “It did change my perspective in terms of the Canadian government.”

The two Khadr cases have taken up about a third of Whitling’s time — largely *pro bono* — for several years; Parlee McLaws, he says, has been very supportive, as has the wider legal community. Once a decision is handed down for Omar, the work won’t end: assuming (as Whitling and Edney do) that the younger Khadr is convicted, his lawyers will attempt to get the government to let him serve his time in Canada, “closer to his family and his citizenship.” (And again, they’re not hopeful.) Whitling doesn’t rule out an appeal, either.

The legacy of the Omar Khadr case, says Whitling, will hopefully see Canadian officials change the way they do business around the world, making a more concerted effort to uphold the rights of their citizens. For the United States, Khadr’s legacy is “anyone’s guess. But it’s going to take years and years to get sorted out.” Globally, he hopes that the case will bring more attention to and perhaps affect international law regarding the plight of child soldiers.

Whitling, unsurprisingly, plays down his own part in the Khadr legacy. When the case is resolved, he says, he’ll simply keep on with his “regular job,” as well as ferrying the kids to gymnastics and soccer, and catching the occasional Oilers or St. Louis Cardinals games. Still, it’s doubtful he’ll stay out of the civil liberties arena for too long: “I don’t know what the next one to come along might be,” he says, “but I’ve always got my eye open for those types of human rights cases.” **N**

Susan Goldberg is a freelance writer based in Thunder Bay.