R. *v.* Noble: *The Supreme Court and the Permissibile Use of Silence*

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The Supreme Court of Canada's 1997 decision in *R.* v. *Noble* held that as a general rule of law, no independent weight is to be attached to the silence of the accused at trial. Writing for a majority of five judges, Sopinka J. stated that placing independent weight on the silence of the accused violates beth the right to silence and the presumption of innocence, and as such constitutes an error of law. The author argues that Sopinka J.'s conclusions are based on flawed reasoning, and specifically on a misguided conception of the principle of a "case to meet". Further, Sopinka J. seems to have given the past case law an unduly narrow reading with the end product being a judgment which is at times contradictory and results in a general rule of law which may be impossible to adhere to in practice.

The dissenting judgment of Lamer C.J.C. is to be preferred from both a legal and a rational perspective. He simply reiterated the law as it existed prior to *Noble*, stating that once the Crown has presented a "case to meet", the accused should legitimately be expected to respond, with the alternative being to risk the trier of fact drawing an adverse inference from silence. Such an inference will properly be drawn where the evidence of the Crown has enveloped the accused in a "strong and cogent net-work of inculpatory facts."

It is hoped that in the future the Supreme Court will revisit the proper use of silence at trial and endorse the dissenting judgment of Lamer C.J.C., thereby adding weight to the logic and effectiveness of the law of evidence in Canada.

Dans la décision *R.* c. *Noble* en 1997, la Cour Suprême a tenu que, comme règle générale de droit, aucun poids indépendant n'est attribuable au silence de l'accusé pendant un procès. M. le juge Sopinka, écrivant pour une majorité de cinq juges, a expliqué que placer un poids indépendant sur le silence de l'accusé viole tant le droit au silence que la présomption d'innocence, et constitue ainsi une erreur de droit. Cet article propose que les conclusions du juge Sopinka sont basées sur un raisonnement imparfait, et particulièrement sur un concept peu judicieux du principe de «preuve complète». De plus, M. le juge Sopinka semble avoir attribué à la jurisprudence antérieure une interprétation trop étroite, le résultat final étant un jugement par moments contradictoire et formulant une règle générale de droit qui pourrait être impossible à mettre en pratique.

Le jugement dissident de M. le juge en chef Lamer est préférable pour sa perspective à la fois légale et de bons sens. Il a simplement réitéré le droit comme il l'était avant la décision *Noble*: une fois que la Couronne ait présenté sa preuve complète, l'on peut légitimement s'attendre à ce que l'accusé réponde. Sinon, le juge des faits risque de tirer des conclusions défavorables quant au silence de l'accusé. Une telle conclusion défavorable sera proprement faite une fois que la Couronne aura présenté contre l'accusé une preuve complète constituant un «ensemble solide et convaincant de faits inculpatoires».

L'on espère que dans l'avenir, la Cour Suprême révisera l'utilisation correcte du silence lors d'un procès, et endossera le jugement dissident de M. le juge en chef Lamer, ajoutant ainsi un poids à la logique et l'efficacité du droit de la preuve au Canada.

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Introduction

In Canada, the accused was made a competent witness for the defence in 1892. Since that time, a tension has existed between the right of the accused to give no evidence, and the potentially adverse consequences that may result from an accused's failure to give evidence. This tension was captured by Ritchie J., writing for the majority in *R.* v. *McConnell*, where he stated:

> [I]t would be "most naive" to ignore the fact that when an accused fails to testify after some evidence of guilt has been tendered against him by the Crown, there must be at least some jurors who say to themselves "If he didn't do it, why didn't he say so."[1]

Unfortunately, the jurisprudence of the past hundred years has failed to articulate a precise rule of general application with respect to the permissible use of silence. In 1982, the waters were muddied further with the advent of the *Canadian Charter of Rights and Freedoms*,[2] and the concomitant constitutional entrenchment of the right to silence and the presumption of innocence in sections 7, 11(c) and (d).

The Supreme Court of Canada has faced the issue of silence on a number of occasions and dealt with it most recently in *R.* v. *Noble*.[3] Specifically, the major issue facing the court in *Noble*, as formulated by Sopinka J., was as follows:

> Under what circumstances is a trier of fact permitted to draw an inference from the failure of an accused to give evidence, and what is the nature of that inference?[4]

By a narrow five-four majority, the Supreme Court held, in a judgment written by Sopinka J., that as a general rule of law, placing independent weight on the silence of the accused violates the right to silence and the presumption of innocence, and as such constitutes an error of law. It is submitted that the Supreme Court has restricted the use of silence further than at any previous time, and in so doing, far from clarifying the matter, the Supreme Court has created a rule of law which will likely cause difficulty and confusion in its application. Moreover, it will be argued in this case comment that the reasoning employed by Sopinka J. in reaching his decision is flawed, particularly with respect to the *Charter* issues, his interpretation of the case law, and the distinction drawn between the trial and appellate levels of decision-making.

After a brief discussion of the trial history of *Noble* in section one, this comment will embark on a critique of Sopinka J.'s judgment with particular reference to the dissenting judgments of Lamer C.J.C. and McLachlin J., as well as an analysis of past case law and relevant academic commentary. Finally, an analysis will be undertaken

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[1] [1968] S.C.R. 802 at 809, 69 D.L.R. (2d) 149 [hereinafter *McConnell*].

[2] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

[3] [1997] 1 S.C.R. 874, 6 C.R. (5th) 1 [hereinafter *Noble* cited to S.C.R.].

[4] *Ibid.* at 916.

regarding the potential impact of this decision on the law of evidence in Canada as it pertains to criminal law.

I. Judgments of the Lower Courts

On March 6, 1994, in Abbotsford, B.C., an apartment manager caught two young men attempting to break into a car using a screwdriver. When asked for identification, one of the young men produced an expired driver's license which, according to the manager, accurately depicted the accused, Sean Jeffrey Noble. As a result, Noble was charged under sections 348(1)(a) and 351(1) of the *Criminal Code*.[5]

At trial, the accused did not testify and was convicted on both charges. Sopinka J. summarized the relevant portion of the trial judge's reasons as follows:

> The trial judge held that the accused in the case before him faced an overwhelming case to meet as a result of the license, yet remained silent. In the trial judge's view, he could draw "almost an adverse inference" that "certainly may add to the weight of the Crown's case on the issue of identification."[6]

Noble appealed his convictions to the British Columbia Court of Appeal.

Writing for the majority, McEachern C.J.B.C. pinpointed the trial judge's statement that the silence of the accused added to the weight of the Crown's case as grounds for allowing the appeal and ordering a new trial. In his judgment, McEachern C.J.B.C. fully canvassed the past case law. Sopinka J. summarized the conclusions of McEachern C.J.B.C. in the following manner:

> He concluded that the silence of an accused cannot be placed on the evidentiary scales, but rather if an accused is silent in the face of evidence that would support a directed verdict of guilty, it is not for the trier of fact to speculate about unstated defences; the belief in guilt beyond a reasonable doubt is not disturbed by the silence of the accused.[7]

Donald J.A. concurred in the result reached by McEachern C.J.B.C. on the basis that the trial judge erred in drawing an adverse inference from the silence of the accused.

Southin J.A. dissented on the issue of silence. As described by Sopinka J., Southin J.A. held that:

> [T]he evidentiary significance of an accused's failure to adduce evidence is that although it is true that a man is not called upon to explain suspicious things, there comes a time when a man is so enveloped by inculpatory circumstantial evidence that that man is bound to make some explanation or stand condemned. ... [I]f the judge is satisfied that the case put forward by the Crown requires some explanation if it is not to be accepted, yet the accused fails to pro-

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[5] R.S.C. 1985, c. C-46.
[6] *Supra* note 3 at 914.
[7] *Ibid.* at 915.

> vide that explanation, there is no reason for the judge not to be satisfied in guilt beyond a reasonable doubt.[8]

In the present case, as the accused offered no explanation, Southin J.A. held that the trial judge did nothing improper and on that basis, would have dismissed the appeal.

II. The Supreme Court of Canada

In his majority judgment, handed down in April 1997, Sopinka J. reached a number of conclusions. The most significant of these was the recognition of a general rule of law which prohibits placing the silence of the accused on the evidentiary scales. Sopinka J. delineated two limited, permissible uses of silence, and one exception to the general rule for cases where an alibi is raised as a defence. Further, the general rule is applicable only in the trial setting as Sopinka J. drew a distinction between the trial and appellate levels of decision-making.

Sopinka J.'s statement of the general rule was supported by a two-fold rationale based on the *Charter of Rights and Freedoms*.[9] The first protection used to support his argument was the right to silence from section 11(c). Here, Sopinka J. equated silence at trial with the right to pre-trial silence and imported the words of Cory J. in *R.* v. *Chambers*[10] from the pre-trial context to the trial setting, where he stated:

> As Cory J. stated in *Chambers*, it would be a "snare and a delusion" to grant the accused a right to remain silent at trial yet then proceed to use silence to find him or her guilty.[11]

Sopinka found further support for his position by equating the use of silence at trial with the conscription of self-incriminating evidence. In his words:

> The failure to testify tends to place the accused in the same position as if he had testified and admitted his guilt. In my view, this is tantamount to conscription of self-incriminating evidence and is contrary to the underlying purpose of the right to silence. In order to respect the dignity of the accused, the silence of the accused should not be used as a piece of evidence against him or her.[12]

The second *Charter* right used by Sopinka J. to rationalize his position was the presumption of innocence, found in section 11(d). He submitted that to use the silence of the accused in reaching a decision of guilt beyond a reasonable doubt was to partially shift the burden of proof onto the accused.[13] Under this analysis, the Crown would only be required to prove guilt somewhere short of reasonable doubt and then use the silence of the accused to elevate the case to proof beyond a reasonable doubt.[14]

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[8] *Ibid.* [footnotes omitted].
[9] *Supra* note 2.
[10] [1990] 2 S.C.R. 1293, [1990] 6 W.W.R. 554 [hereinafter *Chambers* cited to S.C.R.].
[11] *Supra* note 3 at 919.
[12] *Ibid.* at 920.
[13] See *ibid.*
[14] See *ibid.*

To Sopinka J., this results in a shift in the burden of proof, and as such constitutes a violation of the presumption of innocence.

Having set out the general prohibition with regards to the use of silence, Sopinka J. delineated two limited uses of silence which, to him, do not violate the right to silence or the presumption of innocence. These situations are described by Sopinka J. as follows:

> [W]here in a trial by judge alone the trial judge is convinced of the guilt of the accused beyond a reasonable doubt, the silence of the accused may be referred to as evidence of the absence of an explanation which could raise a reasonable doubt. ... Another permissible reference to the silence of the accused was alluded to by the Court of Appeal in this case. In its view, such a reference is permitted by a judge trying a case alone to indicate that he need not speculate about possible defences that might have been offered by the accused had he or she testified.[15]

With respect to these uses of silence, a finding of guilt beyond a reasonable doubt is reached before the silence of the accused is considered. As such, no *Charter* rights are offended and a finding of guilt properly made is merely confirmed.

Beyond these limited uses, Sopinka J. indicated one exception to the general rule whereby triers of fact are entitled to draw adverse inferences from the silence of the accused at trial. The exception applies in the context of an alibi defence.[16] The underpinning to the exception is composed of two parts: the ease of fabrication of alibi evidence, and the potential diversionary effect of an alibi inquiry from the main issues at trial.[17] On the basis of this dual rationale, Sopinka J. recognized that "in the case where the defence of alibi is advanced, the trier of fact may draw an adverse inference from the failure of the accused to testify and subject him- or herself to cross-examination."[18] In order to reconcile this exception with his earlier position regarding the right to silence and the presumption of innocence, Sopinka J. stated that the alibi exception "has a long and uniform history pre-dating the *Charter* and must be taken to have been incorporated into the principles of fundamental justice in s. 7."[19]

While Sopinka J. recognized that the same principles apply to both trials by jury and trials by judge alone,[20] he drew a distinction between the principles applicable at the trial level and those applicable at the appellate level. He acknowledged the wealth of case law which supports the right of appellate courts to consider the silence of the accused in determining if a guilty verdict was reasonable, and rationalized this with the prohibition of such consideration at trial by stating that the *Charter* principles operate differently on appeal. With respect to the presumption of innocence he concluded:

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[15] *Ibid.* at 921.
[16] See *ibid.* at 942.
[17] See *ibid.* at 943.
[18] *Ibid.* at 944.
[19] *Ibid.*
[20] See *ibid.* at 931.

> [T]he presumption of innocence does not operate with the same vigour in the context of an appeal of a conviction as it does at trial. After the guilty verdict has been entered, it is no longer incumbent on the Crown to establish guilt — that guilt having already been proved beyond a reasonable doubt — rather it is incumbent on the appellant to demonstrate an error at trial. In such a context, the presumption of innocence is not applied in the same manner as it is at trial.[21]

Similarly, he concluded with respect to the right to silence:

> [T]he right to silence does not have the same meaning on appeal. At the appellate stage, a conviction has previously been entered. Regardless of the use of silence by the appellate court in exercising its discretion to confirm the conviction or order a new trial, the conviction will not be reached on the basis of the silence of the accused, rather the presumption of guilt established by the guilty verdict will not be dislodged.[22]

By reaching the conclusion that the *Charter* principles in question operate differently at the appellate level, Sopinka J. was able to justify this distinction. In his view, since the rationale for a prohibition at trial does not exist on appeal, then neither should the prohibition be applicable on appeal.

With greatest respect to the late Sopinka J., it is submitted that the reasoning employed by him in reaching these conclusions is flawed. Specifically, the following analysis is intended to show that in its proper context, drawing an inference from silence at trial offends neither the right to silence nor the presumption of innocence. Sopinka J. has given the past case law an unduly narrow reading and the distinction between the trial and appellate levels is inappropriate. Further, Sopinka J.'s general prohibition is at odds with section 4(6) of the *Canada Evidence Act*,[23] and in practice it will create real difficulties, if not impossibilities, in its application.

III. The Right to Silence

Dealing initially with the right to silence, Sopinka J. equated silence at trial with silence in the pre-trial context. This position, however, is at odds with an earlier position taken by him in *R.* v. *Crawford*,[24] a case that dealt with the issue of pre-trial silence. Writing for a majority of eight judges, Sopinka J. wrote the following:

> *[A] clear distinction exists between the right to silence at trial and pre-trial silence.* Prior to or on arrest, the accused is in a much more vulnerable position against the coercive power of the state. The environment in the police station is different from that of the courtroom where procedural rules protect the accused. ... Evidential use of silence forces the suspect to cooperate with his interrogators without a reciprocal exchange of information and without placing proper limits on the power of the police to demand cooperation. In contrast, in

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[21] *Ibid.* at 940.

[22] *Ibid.* at 940-41.

[23] R.S.C. 1985, c. C-5.

[24] [1995] 1 S.C.R. 858, 27 C.R.R. (2d) 1 [hereinafter *Crawford* cited to S.C.R.].

> the courtroom, the accused is represented, he knows the case that he has to meet (due to disclosure) and there are rules regarding admissibility of evidence.[25]

While Sopinka J. did not elaborate on the implications of this distinction with respect to the use of silence at trial, the inference seems to be clear: given the protections and safeguards existing in the trial context, there may be situations where the accused can legitimately be expected to testify. To state that the right to silence operates in the same way at trial as it does in the pre-trial context would be to render this "clear distinction" meaningless.

With respect to the right to silence Sopinka J. further stated that the underlying rationale supported his conclusion. As an authoritative statement of the underlying justification, he quoted his own unanimous judgment from *R.* v. *Amway Corporation (of Canada) Limited*, where he stated:

> Applying a purposive interpretation to s. 11(c), I am of the opinion that it was intended to protect the individual against the affront to dignity and privacy inherent in a practice which enables the prosecution to force the person charged to supply the evidence out of his or her own mouth.[26]

However, this statement was made in concluding that a corporation could not seek the protection of section 11(c). Taken in its proper context, that statement was merely distinguishing individual defendants from corporate defendants and as such, Sopinka J.'s conclusion in *Noble* that "[t]he right to silence is based on society's distaste for compelling a person to incriminate him- or herself with his or her own words"[27] is an incomplete exposition of the rationale behind that right. To fully appreciate the right to silence, reference must be made to the principle of a "case to meet".

In his dissenting judgment in *Noble*, Lamer C.J.C. makes reference to his own majority judgment in *R.* v. *Dubois*,[28] where he analyzed the relationship between the right to silence and the principle of a "case to meet". He stated:

> The Crown's "burden of establishing guilt" and the "right to silence", i.e., the concept of a "case to meet", which are essential elements of the presumption of innocence, also underlie the non-compellability right.[29]

Lamer J. (as he then was) then proceeded to endorse the words of Professor Ratushny who wrote:

> In many ways, it is the principle of a "case to meet" which is the real underlying protection which the "non-compellability" rule seeks to promote. The important protection is not that the accused need not testify, but that the Crown must prove its case before there can be any expectation that he will respond, whether by testifying himself, or by calling other evidence. However, even

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[25] *Ibid.* at 876-77 [emphasis added].
[26] [1989] 1 S.C.R. 21 at 40, 56 D.L.R. (4th) 309.
[27] *Supra* note 3 at 920.
[28] [1985] 2 S.C.R. 350, 23 D.L.R. (4th) 503 [hereinafter *Dubois* cited to S.C.R.].
[29] *Ibid.* at 357.

> where a "case to meet" has been presented, the burden of proof remains upon the Crown to the end.[30]

Professor Paciocco, in his book, *Charter Principles and Proof in Criminal Cases* states with reference to the Supreme Court of Canada:

> The court has concluded that the purpose of the constitutional provision [s. 11(c)] is not primarily to enable a person to remain silent; it is to ensure that the Crown establishes a case against someone before that person is expected to respond in any way to the allegation made against him. This principle of "a case to meet" is essential to the preservation of liberty of persons in Canadian society, and it forms the basis upon which the various components of s. 11(c) can be interpreted and understood.[31]

Professor Paciocco elaborates on the principle of a "case to meet" and its relationship to the silence of the accused at trial:

> [T]his principle of a case to meet relates to the Crown's obligation to present a prima facie case so as to avoid being non-suited by a motion for a directed verdict of acquittal. It does not refer to the Crown's ultimate burden of proving guilt beyond a reasonable doubt. If this is so, once the Crown meets its case, the accused can legitimately be expected to respond, whether by testifying or otherwise, and his failure to do so can be used as the basis for logical inferences without violating the principle. In other words, the force of s. 11(c) should be considered spent where the Crown has closed its case without being met by a successful motion for a directed verdict of acquittal.[32]

This passage was subsequently affirmed by a majority of the Supreme Court of Canada in *R.* v. *P.(M.B.).*[33]

Thus, Sopinka J.'s conclusion with respect to the rationale behind the right to silence is correct so long as it is viewed within the context of a case to meet. The adverse inference from an accused's silence at trial is offensive to the dignity of the individual only where it is used to help establish a *prima facie* case. However, once the Crown has put forward some evidence with regard to each element of the offence, such that it could, if believed, result in a finding of guilt beyond a reasonable doubt, then the silence of the accused may legitimately be considered without violating that accused's right to silence. As Lamer C.J.C. pointed out in his dissenting judgment, once the Crown puts forth a case to meet, "[i]f a conviction is subsequently entered, regardless of the use of silence, the trier of fact has concluded that the Crown has proved its case beyond a reasonable doubt, and nothing else."[34]

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[30] E. Ratushny, "The Role of the Accused in the Criminal Process" in G.-A. Beaudoin & W.S. Tarnopolsky, eds., *The Canadian Charter of Rights and Freedoms: Commentary* (Scarborough, Ont.: Carswell, 1982) 335 at 358-59.

[31] D.M. Paciocco, *Charter Principles and Proof in Criminal Cases* (Scarborough, Ont.: Carswell, 1987) at 480.

[32] *Ibid.* at 495.

[33] [1994] 1 S.C.R. 555 at 579, 113 D.L.R. (4th) 461 [hereinafter *P.(M.B.)* cited to S.C.R.].

[34] *Supra* note 3 at 895.

IV. The Presumption of Innocence

Turning now to the presumption of innocence, Sopinka J. stated that to consider the silence of the accused in making a finding of guilt beyond a reasonable doubt results in a partial shift in the burden of proof, and as such, constitutes a breach of section 11(d) of the *Charter*. Specifically, he concluded that "in order for the burden of proof to remain with the Crown, as required by the *Charter*, the silence of the accused should not be used against him or her in building the case for guilt."[35] However, this is a rather bald proposition offered with very little supporting analysis. Upon closer inspection, it is submitted that Sopinka J.'s proposition is untenable, and, considered in the proper context, drawing an inference from the silence of the accused does not violate section 11(d).

Sopinka J., in support of his position, quoted from the majority decision in *Dubois*:

> Section 11(d) imposes upon the Crown the burden of proving the accused's guilt beyond a reasonable doubt as well as that of making out the case against the accused before he or she need respond, either by testifying or calling other evidence.[36]

This passage seems to impose two separate duties on the Crown by virtue of section 11(d). The first refers to the ultimate burden of proving guilt beyond a reasonable doubt. The second is that of "making out the case against the accused," *i.e.* presenting a "case to meet" at which point the accused may legitimately be expected to respond.

It appears that Sopinka J. would read the latter part of the passage as having the same meaning as the former. Phrased another way, Sopinka J. seemed to imply that an accused need not respond until that accused's guilt has been proven beyond a reasonable doubt. However, this position confuses the standards which apply to different stages of the trial. While the ultimate burden of proving guilt beyond a reasonable doubt remains with the Crown throughout the trial process, that is a determination to be made by the trier of fact as a final stage in the process. As part of discharging that burden, the initial threshold of presenting a case to meet must be satisfied. If the Crown successfully puts forth a case to meet, the accused can be expected to respond, and if no response is tendered that is a factor properly considered by the trier of fact in determining whether the proffered case to meet satisfies the standard of proof of beyond a reasonable doubt.

On Sopinka J.'s interpretation, the accused need not respond until guilt has been established beyond a reasonable doubt. With respect, this is a confusing proposition given that the trier of fact does not make this determination until both prosecution and defence have rested their cases. A more logical interpretation, and one that better fits within the parameters of Canadian criminal procedure, is that the accused is not called upon to respond until the Crown puts forth a case to meet, which is merely evidence *capable* of supporting a finding of guilt beyond a reasonable doubt. Authority for this

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[35] *Ibid.* at 921.

[36] *Supra* note 28 at 357.

proposition is found in the following statement by Laskin J. (as he then was) in *R.* v. *Appleby:*

> In a more refined sense, *the presumption of innocence gives an accused the initial benefit of a right of silence* and the ultimate benefit (after the Crown's evidence and any evidence tendered on behalf of the accused are in) of any reasonable doubt.
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> *What I have termed the initial benefit of a right of silence may be lost when evidence is adduced by the Crown which calls for a reply.* This does not mean that the reply must necessarily be by the accused himself. However, if he alone can make it, he is competent to do so as a witness in his own behalf; and I see nothing in this that destroys the presumption of innocence. It would be strange indeed if the presumption of innocence was viewed as entitling an accused to refuse to make any answer to the evidence against him without accepting the consequences in a possible finding of guilt against him.[37]

A further consideration in analyzing the nexus between the use of silence and the presumption of innocence is the distinction between the burden of proof and the evidence used to discharge that burden. As Glanville Williams noted, "[t]he rule as to burden of proof has nothing to say on what evidence shall be taken into account."[38] As an illustration of this distinction, consider a situation where a defence witness slips on direct examination and inadvertently offers some evidence harmful to the position of the accused. Surely the Crown would be entitled to make use of this evidence without concern being raised as to a shift in the burden of proof. The same can be said for testimony given by the accused in court or admissions made by the accused out of court. Both can and often do prove to be useful to the Crown in the discharge of the burden of proof without any concern about an improper shift in that burden.

Similarly, the silence of the accused, in some circumstances, can have probative value. When the evidence led by the Crown is such that it calls for a reply, the silence of the accused can add weight to the Crown's case and aid in the discharge of the burden. This situation was aptly described by Irving J. of the British Columbia Supreme Court in *R.* v. *Jenkins* where he stated:

> It is true that a man is not called upon to explain suspicious things, but there comes a time when, circumstantial evidence enveloped a man in a strong and cogent net-work of inculpatory facts, that man is bound to make some explanation or stand condemned.[39]

Thus, it seems that it is possible to consider the silence of the accused and to treat that silence as evidence in discharging the Crown's burden of proof[40] without offending the presumption of innocence contained in section 11(d) of the *Charter.*

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[37] (1971), [1972] S.C.R. 303 at 317-18, 21 D.L.R. (3d) 325 [emphasis added; footnotes omitted; cited to S.C.R.].

[38] G. Williams, "The Tactic of Silence" (1987) 137 New L.J. 1107 at 1108.

[39] (1908), 14 B.C.R. 61 at 69, 9 W.L.R. 405 (C.A.) [hereinafter *Jenkins* cited to B.C.R.].

[40] R.J. Delisle, "Silence at Trial: Inferences and Comments" (1997) 1 C.R. (5th) 313 at 318.

V. The Case Law

In his reasons, Sopinka J. took a very narrow view of the previous case law, and with the result being an unduly restricted scope for the permissible use of silence at trial. He chose to ignore the oldest cases highlighted by Lamer C.J.C and instead focused on the most recent decisions from the Supreme Court of Canada. However, the older cases are useful in providing a context within which to view the modern decisions, and they are also beneficial in showing how the principles have evolved. His oversight is not surprising, though, given that Sopinka J. seemed inclined to restrict the use of silence to a role merely confirmatory of guilt, a position far more constricted than that espoused in those early cases.

The first decision overlooked by Sopinka J. is *R.* v. *Burdett*, an English decision of the Court of King's Bench in which Abbott C.J. had the following to say about an accused's failure to tender any evidence in his own defence:

> In drawing an inference or conclusion from facts proved, regard must always be had to the nature of the particular case, and the facility that appears to be afforded, either of explanation or contradiction. No person is to be required to explain or contradict, until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction, but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, if the conclusion to which the proof tends be untrue, and the accused offers no explanation or contradiction; can human reason do otherwise than adopt the conclusion to which the proof tends?[41]

The second case was the 1908 decision in *Jenkins*, discussed in the previous section, in which the court held that the silence of the accused can add weight to the Crown's case.[42] Third, a similar statement was put forth in the 1931 decision of the Ontario Court of Appeal in *R.* v. *Steinberg*, a decision later affirmed by the Supreme Court of Canada:

> [N]otwithstanding all the damning chain of evidence, he chooses to maintain silence. No comment may be made on this to the jury, but the law does not forbid jurors to use their intelligence and to consider the absence of denial or explanation.[43]

While there has been sufficient jurisprudence in recent times to analyze this issue, Lamer C.J.C. rightly pointed out that these cases serve to show that the drawing of adverse inferences from the silence of the accused is hardly a novel proposition.[44]

Turning to the modern jurisprudence, the decisions have at times been ambiguous. Sopinka J. seized upon these ambiguities and used them to support his conclusions. However, it is submitted that he erred in doing so and a better interpretation of

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[41] (1820), 4 Barn. & Ald. 95 at 161-62, 106 E.R. 873 (K.B.).

[42] *Supra* note 39.

[43] (1931), 56 C.C.C. 9 at 36, 40 O.W.N. 71, aff'd [1931] S.C.R. 421 [hereinafter *Steinberg* cited to C.C.C.].

[44] See *supra* note 3 at 884.

the case law is one in line with the traditional approach which includes the right to draw inferences from silence in appropriate circumstances.

The first decision canvassed by Sopinka J. was *R.* v. *Francois*.[45] In this case McLachlin J., for the majority, wrote:

> In any event, subject to the caveat that failure to testify cannot be used to shore up a Crown case which otherwise does not establish guilt beyond a reasonable doubt, a jury is permitted to draw an adverse inference from the failure of an accused person to testify.[46]

It is immediately apparent that this passage is contradictory. Professor Delisle, in his annotation to *François* noted the intractable nature of the two statements and asked, "If a jury cannot use the failure to testify to assist in its determination of whether they are satisfied beyond a reasonable doubt, then pray tell what the permissible inference does? For what else can the jury use it?"[47]

The ambiguity is compounded by the Supreme Court in its decision in *R.* v. *Lepage*.[48] Writing for the majority, Sopinka J. relied in part on the judgment of Arbour J.A. in *R.* v. *Johnson*.[49] The passage quoted by Sopinka J. from *Lepage* is as follows:

> No adverse inference can be drawn if there is no case to answer. A weak prosecution's case cannot be strengthened by the failure of the accused to testify. But there seems to come a time, where, in the words of Irving, J.A. in *R.* v. *Jenkins*, "circumstantial evidence having enveloped a man in a strong and cogent network of inculpatory facts, that man is bound to make some explanation or stand condemned". That point, it seems to me, can only be the point where the prosecutions's evidence, standing alone, is such that it would support a conclusion of guilt beyond a reasonable doubt. Viewed that way, it would be better said that the absence of defence evidence, including the failure of the accused to testify, justifies the conclusion that no foundation for a reasonable doubt could be found on the evidence. *It is not so much that the failure to testify justifies an inference of guilt; it is rather that it fails to provide any basis to conclude otherwise.*[50]

Lamer C.J.C., in his dissenting opinion in *Noble*, noted the ambiguity in this passage and quoted two further paragraphs written by Arbour J.A. in *Johnson*:

> On the other hand, in the face of proven facts calling out for an explanation, the failure of the accused to testify has evidentiary significance when the accused is in a unique position to provide such an explanation. Failure to testify is not evidence of guilt. It cannot be used to relieve the Crown of its burden of proving guilt beyond a reasonable doubt. However, when an innocent explanation for an incriminating set of facts is not offered by the accused, or when his explana-

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[45] [1994] 2 S.C.R. 827, 116 D.L.R. (4th) 69 [hereinafter cited to S.C.R.].

[46] *Ibid.* at 835.

[47] R.J. Delisle, Annotation to *R.* v. *Francois* (1994), 31 C.R. (4th) 201 at 204.

[48] [1995] 1 S.C.R. 654, 36 C.R. (4th) 145 [hereinafter *Lepage* cited to S.C.R.].

[49] (1993), 12 O.R. (3d) 340, 21 C.R. (4th) 336 (C.A.).

[50] *Supra* note 3 at 926 quoting from *Lepage*, *supra* note 48 at 670 [emphasis in original and footnotes omitted].

> tion comes solely from an out-of-court statement which has been introduced in evidence, if he does not submit himself to cross-examination, the judge or jury may properly draw from that an inference unfavourable to the accused.
>
> *In short, judges, like juries, may draw an inference from the failure of the accused to testify, but only in circumstances where the inference is justified.* For one thing, if, at the end of the prosecution's case, the evidence is such that a properly instructed jury, acting reasonably, could not convict, the accused is entitled to an acquittal, on a motion to that effect, without having been called upon to tender a defence, let alone to testify. However, assuming that the prosecution's case is strong enough to survive a motion for a directed verdict, and that there is therefore a case for the defence to answer, it is not always appropriate to draw an inference of guilt from the accused's failure to testify. The inference is linked not only to the strength of the Crown's case, but also to the logical expectation of an innocent explanation which can either come only from the accused, or, as in the case of an alibi, would be strengthened by his oath.[51]

Lamer C.J.C., in his assessment of *Johnson*, concluded that the wavering by Arbour J.A. could be attributed to a concern that adverse inferences not be drawn in every case where the accused chose not to testify.[52] This is a sound conclusion and one more rooted in logic than the Denning-like statement of Sopinka J. that the meaning of the decision in *Johnson* is "clear" in supporting his conclusions. Lamer C.J.C. recognized that silence can have probative value, and attempted to balance this against the potential of unfair prejudice being caused to the accused if adverse inferences are too readily drawn. The solution, in his view, is to draw an inference only "where the accused is 'enveloped ... in a strong and cogent net-work of inculpatory facts.'"[53] While this is admittedly a rather arbitrary criterion, it leaves the matter to the good sense of the trier of fact, which is a preferable approach to the simplistic, unduly narrow approach taken by Sopinka J.

One factor contributing to Sopinka J.'s overly narrow conclusion is his seemingly misguided conception of a case to meet. Sopinka J. seems to equate this concept with proof beyond a reasonable doubt which, with respect, is an erroneous characterization. McLachlin J., in her dissenting judgment, took note of this and stated:

> The difference between the positions adopted by Lamer C.J.C. and Sopinka J. turns on a different conception of the case to meet. It is resolved in favour of the view taken by the Chief Justice, to my mind, by the fact that the Crown establishes a case to meet only when it adduces evidence which, if believed, would establish proof beyond a reasonable doubt.[54]

It is apparent that the concept of a case to meet is not the equivalent of proof beyond a reasonable doubt. Rather, it is a threshold that must be met before two things can happen. The first is that once there is a case to meet, the accused is expected to respond or risk an adverse inference being drawn. The second is that only when there is a case to

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[51] *Ibid.* at 894 [emphasis added].

[52] See *ibid.*

[53] *Ibid.* at 895 quoting from *Jenkins, supra* note 39 at 69.

[54] *Ibid.* at 946.

meet will the trier of fact take the next step and determine if that case, when considered with any evidence offered by the defence, satisfies the standard of proof beyond a reasonable doubt. However, it becomes apparent from Sopinka J.'s analysis in *Noble* that he equates the latter standard with that of a case to meet.

The first reference to Sopinka J.'s characterization was that made above in the discussion of *Dubois*. There, Sopinka J. would read the passage from Ratushny which states, "the Crown must prove its case before there can be any expectation that [the accused] will respond"[55] as including the words "beyond a reasonable doubt" after the word "case". This misconception of the requirements of a case to meet is further evidenced in Sopinka J.'s analysis of the recent jurisprudence on the issue of silence.

In *Lepage*, Sopinka J. stated:

> Although I have concluded above that Pardu J. did not draw any adverse inference from the respondent's failure to offer an explanation for the presence of his fingerprints, *I note that once the Crown had proved a prima facie case, the trial judge would be entitled to draw such an inference in any event.*[56]

In order for Sopinka J.'s conclusion that silence is merely confirmatory of guilt to make sense, the reference to a "prima facie case" above must be equated with proof beyond a reasonable doubt. However, as already noted, the difference between a case to meet and proof beyond a reasonable doubt is that the former merely represents evidence which is *capable* of supporting a finding of guilt beyond a reasonable doubt. It is for the trier of fact to determine whether it actually does so.

It is this misconception of a case to meet which leads Sopinka J. to discount the use of the word "inference" when referring to silence.[57] He acknowledged that the confirmatory role he reserved for the use of silence renders any "inference" a superfluous one, and for that reason, he concluded "that courts should generally avoid using the potentially confusing term 'inference' in discussing the silence of the accused."[58] With respect to Justice Sopinka, it appears to be his reasoning which is confusing and not the use of the term "inference". An inference is a deduction made from accepted evidence, and as such, the silence of the accused should, in appropriate circumstances, be open to consideration in making a finding of guilt beyond a reasonable doubt. Sopinka J.'s admonishment to avoid the use of this term is merely a concession that the word "inference" can have no other meaning. Further, to now stop using the term is a rather feeble manner of avoiding the jurisprudence which makes repeated reference to the drawing of inferences from the silence of the accused.

The last case to be discussed by Sopinka J., and perhaps the most troublesome from his point of view, is *P.(M.B.)*.[59] Writing for the majority in this case, Lamer C.J.C. stated:

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[55] *Supra* note 30 at 359.

[56] *Supra* note 48 at 670 [emphasis added].

[57] See *supra* note 3 at 927.

[58] *Ibid.*

[59] *Supra* note 33.

> Once ... the Crown discharges its obligation to present a *prima facie* case, such that it cannot be non-suited by a motion for a directed verdict of acquittal, the accused can legitimately be expected to respond, whether by testifying him or herself or calling other evidence, and failure to do so *may* serve as the basis for drawing adverse inferences .... In other words, once there is a "case to meet" which, if believed, would result in conviction, the accused can no longer remain a passive participant in the prosecutorial process and becomes — in a broad sense — compellable.[60]

Sopinka J. displayed considerable difficulty dealing with this case and, in his attempt to do so, contradicted himself in relation to his position taken earlier regarding the presumption of innocence. With respect to the reference above to "broad compellability", Sopinka J. stated that "once the Crown has proved a case to meet ... it may be a wise strategy for the accused to testify in order to refute the case to meet; this does not involve a shift in the legal burden of proof to the accused, but rather involves a shift of a strategic burden."[61]

This statement is difficult to reconcile with Sopinka J.'s earlier reference to a violation of the presumption of innocence. Why would it be a wise strategy for the accused to testify in order to refute the case to meet? There are two possible answers. The first is that should the accused fail to testify, the accused risks an adverse inference being drawn as a result. However, on Sopinka J.'s earlier analysis, in contradiction of his present statement, this results in a shift in the legal burden of proof which violates the presumption of innocence, and as such, is impermissible. The second possibility is that the case to meet is equivalent to guilt beyond a reasonable doubt. If this were so, there would be no shift in the legal burden of proof as that burden would have already been discharged. However, this is a problematic position as well, as it is based on an erroneous conception of a case to meet.

In short, Sopinka J.'s attempts to reconcile his position with that of the Supreme Court in *P.(M.B.)* are unsatisfactory. More logically, the reason why it would be a wise strategy for the accused to testify once the Crown has put forward a case to meet is that should no reply be offered the accused risks an adverse inference being drawn on the basis of that silence. Such an inference will be drawn where the Crown evidence has enveloped the accused "in a strong and cogent net-work of inculpatory facts"[62] and will violate neither the right to silence nor the presumption of innocence.

VI. The Distinction Between the Appellate and Trial Levels

A further aspect of Sopinka J.'s judgment which is problematic is the distinction drawn between the trial and appellate levels of decision-making. Pursuant to section 686 of the *Criminal Code*,[63] appellate courts are given the power to uphold a conviction notwithstanding an error of law at trial, so long as the court is satisfied that no

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[60] *Ibid.* at 579 [emphasis added].
[61] *Supra* note 3 at 929.
[62] *Supra* note 53.
[63] *Supra* note 5.

miscarriage of justice has occurred. In assessing the propriety of a verdict, there is a wealth of case law endorsing the consideration of an accused's failure to testify. In *Steinberg* it was held:

> The accused gave no evidence; and, while this cannot be commented upon to the jury, it is a factor which must be considered by the Appellate Court. His failure to testify does not prove his guilt, but when the court is by the statute required to dismiss an appeal unless it is satisfied there was a miscarriage of justice, the failure of the accused to explain in any way facts which place a very heavy onus on him cannot be ignored.[64]

Further, the following statement of the British Columbia Court of Appeal in *R.* v. *Pavlukoff*[65] was affirmed by the Supreme Court of Canada in *Avon* v. *R.*:

> [T]he fact that the accused did not testify in the face of inculpatory facts was a matter which the Court of Appeal could place on the scale in applying s. 1014(2).[66]

In *R.* v. *Corbett*,[67] the Supreme Court dealt with this issue again with reference to the British Columbia Court of Appeal, which had expressly considered the silence of the accused in upholding a guilty verdict as reasonable. Pigeon J., writing for the majority, stated:

> No one can reasonably think that a jury will fail, in reaching a verdict, to take into account the failure of the accused to testify, specially in a case like this. This being so, it is a fact properly to be considered by the Court of Appeal when dealing with the question: "Is this a reasonable verdict?"[68]

More recently, the Supreme Court revisited the issue in *R.* v. *Leaney* where it held:

> It is well-established that in considering whether a conviction may be upheld under s. 613(1)(b)(iii) of the *Criminal Code*, the court may take into account the accused's failure to explain evidence which connects him with the crime.[69]

Faced with these clear and unambiguous statements regarding the use of silence on appeal, the only way for Sopinka J. to reconcile these with his conclusions respecting the use of silence at trial was to distinguish the principles which apply at the trial and appellate levels. As discussed above, he based his distinction on the proposition that the *Charter* rights to silence and the presumption of innocence, if they apply at all, operate differently and without the same force on appeal. While there is something incongruous in the idea that an accused can lose the protection of *Charter* rights, a part of the fundamental law of Canada, simply by moving up a level of court, this distinction also creates the potential for illogical results.

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[64] *Supra* note 43 at 36.
[65] [1953] 10 W.W.R. 26, 17 C.R. 215 (B.C.C.A.)
[66] [1971] S.C.R. 650 at 657, 21 D.L.R. (3d) 442.
[67] (1973), [1975] 2 S.C.R. 275, 14 C.C.C. (2d) 385 [hereinafter *Corbett* cited to S.C.R.].
[68] *Ibid.* at 280-81.
[69] [1989] 2 S.C.R. 393 at 418, 71 C.R. (3d) 325.

As an illustration of this potential irrationality, consider a situation where an accused is convicted at trial, in part on consideration of a failure to testify. Applying Sopinka J.'s newly articulated rule of law, this would violate the right to silence and the presumption of innocence, and would thus constitute a reversible error of law. Assuming this was the only error, the verdict could be appealed on that basis. However, on appeal, as the accused's *Charter* rights no longer operate with the same force, a court of appeal is entitled to consider the silence of the accused in finding that no substantial miscarriage of justice occurred. Thus, by the very same chain of reasoning which at trial violated the accused's *Charter* rights and constituted an error of law, that error of law may be disregarded and a guilty verdict may be upheld as reasonable by a court of appeal. The absurdity of this situation is manifest and would justify an accused unfortunate enough to be subjected to this reasoning to conclude that "the law is an ass."

Lamer C.J.C. recognized the problematic nature of the distinction and stated the following:

> If the role of the trier of fact is to have any meaning, appellate courts must undertake their statutory responsibility to review the fitness of verdicts and to cure trial errors on the same understanding of the silence of the accused. I cannot endorse a criminal justice system in which an accused's silence may be used to a greater extent by appellate judges than by triers of fact at the trial level. Otherwise the Court is effectively sanctioning what it says is prohibited — inviting both judges and juries to use silence as evidence, but asking them to keep it quiet.[70]

The distinction is further weakened when the nature of the supposed error at trial is considered. The presumption of innocence and the right to silence are two of the most fundamental and firmly-rooted principles of the Canadian criminal justice system. Surely a violation of these rights cannot be disregarded so cavalierly on appeal in upholding the verdict as a reasonable one. The better position, in logic and on principle, is to reconcile the use of silence on appeal with that at trial by recognizing that an accused's failure to testify can properly be considered at trial without violating the right to silence or the presumption of innocence. This position allows the same principles to apply at trial as on appeal, and eliminates the potential for irrational results.

VII. Implications

Having examined the reasoning of Sopinka J., it becomes necessary to turn to the impact and effects that his majority decision in *Noble* is likely to have on the law of evidence in Canada as it pertains to criminal matters. Notwithstanding the flawed reasoning employed by Sopinka J., the rule which emerges from his decision is one which will be very difficult, if not impossible, to employ in practice. The reason for the difficulty is that it may very well be impossible for a trier of fact to make a decision based solely on what it has heard, without consideration of what it has not heard as well.

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[70] *Supra* note 3 at 891.

The proposition that decision makers will consider both what they have and have not heard has received longstanding recognition in Canadian jurisprudence. For example, in *Corbett*, Pigeon J. stated:

> No one can reasonably think that a jury will fail, in reaching a verdict, to take into account the failure of the accused to testify.[71]

Similarly, in *R.* v. *Marcoux (No. 2)*, Dickson J. (as he then was) concluded:

> [A] jury is free to draw, and I have no doubt frequently does draw from the failure [to testify], an inference adverse to the accused.[72]

Further, Ritchie J. wrote for the Supreme Court in *McConnell*:

> [I]t would be "most naive" to ignore the fact that when an accused fails to testify after some evidence of guilt has been tendered against him by the Crown, there must be at least some jurors who say to themselves "If he didn't do it, why didn't he say so."[73]

In each of these decisions, it was recognized that as a matter of common sense, the silence of the accused can have probative value, and lay-juries will accede to their own common sense and consciously consider the silence of the accused. This pragmatic viewpoint is far from a recent development. Instead, it is a concession to human nature that has received longstanding recognition. Professor Delisle, in his textbook, *Evidence: Principles and Problems*, quotes Jeremy Bentham who observed well over a hundred years ago:

> Between delinquency on the one hand, and silence under inquiry on the other, there is manifest connection; a connection too natural not to be constant and inseparable.[74]

However, it seems that even if a trier of fact were to make a conscious effort not to take account of the silence of the accused, that silence will inevitably be considered, consciously or subconsciously, in determining the weight to be attached to the evidence that has been heard. In his reasons in *Noble*, Sopinka J. states that one permissible use of silence is to note that the evidence led by the Crown stands uncontradicted.[75] This begs the question of whether there is a difference between expressly considering silence and merely noting that evidence is uncontradicted. Lamer C.J.C. does not see a difference. As he concluded:

> I find it illogical for the Court to say that silence may be used by judges and juries but only to the extent that it highlights the fact that the Crown's evidence remains uncontradicted. Uncontradicted by whom? To allow a trial judge to instruct the jury that the evidence remains uncontradicted is just a coded message

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[71] *Supra* note 67 at 280-81.

[72] (1975), [1976] 1 S.C.R. 763 at 775, 60 D.L.R. (3d) 119.

[73] *Supra* note 1 at 809.

[74] R.J. Delisle, *Evidence: Principles and Problems*, 4th ed. (Scarborough, Ont.: Carswell, 1996) at 731.

[75] See *supra* note 3 at 924.

> to remind the jury that the accused has not led any evidence in his or her own defence.[76]

An illustration may be helpful in demonstrating the futility in attempting to consider only what has been heard with no regard for what has not been heard. Consider a situation where three people — X, Y and Z — are talking. Y has just introduced X to Z for the first time. As part of the introduction, Y states that Z is a soldier. Z remains silent. X, having heard nothing to the contrary, might logically conclude that the statement is true. This is not to say the statement will automatically be believed. Perhaps there was something in the tone or body language of Y that would suggest he was lying. Perhaps X knows Y to be a person who habitually lies. Perhaps the appearance or demeanour of Z makes it unlikely that Z actually is a soldier. All of these factors will weigh in whether X believes the statement that Z is a soldier. However, the fact that X has heard nothing to the contrary will inevitably be another consideration in the decision to believe or disbelieve. What X ultimately decides is irrelevant. What is important is that X cannot make a choice without at least subconsciously considering what has not been heard, and with no express declaration to the contrary, there remains at least a possibility that the statement made by Y is true.

Similarly, in the context of a criminal trial, a trier of fact facing uncontradicted Crown evidence may choose to believe or disbelieve that evidence in whole, or in part. However, the absence of any express declaration to the contrary made by the accused will at the very least leave open the possibility that the allegations made by the Crown are true. It is in this sense that a trier of fact will inevitably consider silence in reaching a decision. Depending on the nature of the evidence that has been led, the weight to be attributed to silence will vary. Silence will be more probative where there is a "strong and cogent net-work of inculpatory facts."[77] For these reasons, the rule articulated by Sopinka J., that no consideration may be given to the silence of the accused in reaching a verdict of guilt beyond a reasonable doubt, is an illusory one.

Not only is the rule articulated by Sopinka J. one which is impracticable to follow, but it seems undesirable for an attempt at compliance to even be made. The reason for this undesirability can be found in dictum by Lord Griffiths in the 1992 House of Lords decision in *R.* v. *Kearley* where he stated:

> In my view the criminal law of evidence should be developed along common sense lines readily comprehensible to the men and women who comprise the jury and bear the responsibility for the major decisions in criminal cases.[78]

To ask a trier of fact to completely disregard the silence of the accused where the Crown evidence has enveloped the accused in a "strong and cogent net-work of inculpatory facts" is a request completely at odds with any notion of common sense.

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[76] *Ibid.* at 890.

[77] *Supra* note 53.

[78] [1992] 2 A.C. 228, [1992] 2 All E.R. 345.

Where the evidence is such that it cries out for a response, it is only logical that an inference adverse to the accused be drawn where no response is offered.[79]

Some might argue that such an inference is uncalled for as there may be any number of reasons why an accused person does not testify. Most common is the situation where the history of the accused, embodied in a lengthy criminal record, is so damaging to the accused's credibility that the jury would not be likely to believe the accused's testimony. Alternatively, counsel for an accused may consider the appearance, demeanour, or mannerisms of that accused to be of the sort that more harm than good would result from the accused taking the stand.[80]

While these concerns are real, they may be quelled by a number of replies. The first is that the rules of evidence protect the accused from any undue prejudice at trial.[81] In *Corbett*, it was acknowledged by the Supreme Court of Canada that a discretion resides in the trial judge to disallow cross-examination on prior convictions where its potential prejudice outweighs its probative value.[82] The defence must make a "*Corbett*" application to have cross-examination on prior convictions excluded before the accused is called to the witness stand, with the determination being made on the basis of four factors, as articulated by LaForest J.:

1) The nature of the previous conviction;
2) The similarity of the past conviction to the present charge;
3) The length of time passed between the previous conviction and the present charge;
4) The potentially distorted perception of the accused created in the eyes of the jury.[83]

These criteria are admittedly broad and leave much to the discretion of the trial judge which creates the potential for inconsistent and contradictory application. In this respect, further guidance from the Supreme Court would be welcome. However, as the determination to be made is one that is greatly dependant upon the facts and context of each case, the discretion vested in the trial judge must by necessity remain broad. Further, part of the duty of the trial judge consists of sitting as an impartial observer who is to ensure that the accused receives a fair trial. It would seem that a ruling on a "*Corbett*" application falls squarely within that role, and as such must be entrusted to the intelligence and good sense of the trial judge. The entire credibility of the Canadian criminal justice system depends on just this sort of reliance.

This leads to the alternative conceru regarding an accused who merely does not present well and is advised to remain off the witness stand for that reason. Surely our system of criminal justice is sophisticated to the point that if an accused person le-

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[79] This was the position taken at trial in *Noble* by Lemiski Prov. Ct. J.
[80] See "Silence at Trial", *supra* note 40 at 319.
[81] See *ibid.*
[82] D. Paciocco & L. Stuesser, *The Law of Evidence* (Concord, Ont.: Irwin Law, 1996) at 233.
[83] *Ibid.*

gitimately possesses an innocent explanation to an inculpatory web of circumstantial evidence, that accused would not be convicted simply because of a poor appearance when testifying. If an accused person can be convicted solely on the basis of presentation to the trier of fact, then the entire system is flawed to an extent which runs much deeper than any issue over the use of silence. In short, if an accused person has an innocent explanation for inculpatory evidence, that explanation should be put forth in the presence of the trier of fact. A failure to do so, for whatever reason, should properly create the risk that silence will be used as the basis for an inference adverse to the accused. No less can be expected from a system which bases its existence on justice and the search for truth.

A further implication of Sopinka J.'s majority judgment in *Noble* is that it calls into question the constitutional validity of section 4(6) of the *Canada Evidence Act*.[84] This was a factor noted by Lamer C.J.C. in his dissenting judgment. However, he was the sole judge of the nine sitting who chose to comment on the constitutionality of section 4(6). The provision reads as follows:

> 4(6) The failure of the person charged, or of the wife of such person, to testify shall not be made the subject of comment by the judge or by counsel for the prosecution.[85]

Section 4(6) has been given a very narrow interpretation in the case law, such that it applies only in cases of trial by jury. Where the case is one in front of a judge only, the Crown is free to ask the judge to consider the silence of the accused.[86] Further, as noted by Professors Paciocco and Stuesser, section 4(6) "prevents comments by the Crown or adverse comments from the judge, although it does not prohibit neutral comments by the judge or favourable ones by the defence."[87] The Supreme Court of Canada held in *R.* v. *Vezeau* that a trial judge is not authorized to instruct a jury that they may not consider the silence of the accused.[88]

The rationale for this narrow reading was provided by Pigeon J., writing for the majority of the Supreme Court in *Corbett*. He stated the section:

> provides that the failure of the person charged "shall not be made the subject of comment by the judge, or by counsel for the prosecution", it does not prevent the jury from taking the fact into account without being told.[89]

In other words, the reason for the prohibition stems from a concern that if comments were permitted, a jury may place undue emphasis on the failure of an accused to testify. The section has been interpreted so as not to apply to judges sitting alone as it is assumed that judges will be able to consider the silence of an accused with the proper perspective.[90] What section 4(6) does not do is expressly prohibit the trier of fact from

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[84] *Supra* note 23.
[85] *Ibid.*
[86] See *R.* v. *Binder*, [1948] O.R. 607, 6 C.R. 83 (C.A.).
[87] *Supra* note 82 at 163.
[88] (1976), [1977] 2 S.C.R. 277 at 280, 28 C.C.C. (2d) 81.
[89] *Supra* note 67 at 280.
[90] See Delisle, *supra* note 74 at 737.

considering an accused's failure to testify, which is precisely what Sopinka J. purports to do in *Noble*. Lamer C.J.C. noted the difficulty in reconciling these two positions and observed:

> [I]f this Court is prepared to conclude that the fundamental *Charter* rights to silence and the presumption of innocence prohibit triers of fact from using the accused's silence as evidence, one would have thought that trial judges would be empowered, if not required, to say so. Similarly, if there are subtle, permissible uses to be made of an accused's silence, trial judges must be able to explain them.[91]

For his part, Sopinka J. stated that he preferred not to decide the validity of section 4(6) without the benefit of argument. However, he did go so far as to state that he disagreed that his conclusions could not be reconciled with this section.[92] With respect to Sopinka J., any attempt to do so would once again lead to illogical results. This irrationality manifests itself when it is considered that as the law presently stands, it is not possible to prevent a jury from drawing adverse inferences from the silence of the accused. Sopinka J. conceded this point, recognizing that section 4(6) prohibits a jury direction cautioning against the use of silence, while appellate courts are prohibited from speculating as to the reasoning of a jury.[93] Despite this impossibility, Sopinka J. maintained that it is an error of law for a jury to consider silence in returning a verdict of guilt beyond a reasonable doubt. It is a tenuous proposition to state that juries are free to commit errors of law in convicting accused persons while upholding the law which prevents any remedial action being undertaken. To do so amounts to condonation of a breach of law. If the *Charter* rights to silence and the presumption of innocence are to be given any real meaning, it would seem a minimum level of protection would require a direction to the jury specifically detailing what uses of silence are permissible. For this reason, Lamer C.J.C. was correct when he stated that his "approach to adverse inferences is more consistent with the letter and spirit of s. 4(6) of the *Canada Evidence Act*."[94]

While a declaration of constitutional invalidity with respect to section 4(6), and the creation of a mandatory jury direction on the permissible uses of silence, would resolve one problematic aspect of the judgment written by Sopinka J., it would not solve the other flaws apparent in his reasons. Should the issue arise before the Supreme Court of Canada in the future, as it undoubtedly will, it is hoped that the Court will re-address the intractable rule articulated by Sopinka J. in *Noble*. The traditional position set out by Lamer C.J.C. in his dissenting opinion is consistent with the aims and objectives of the procedural safeguards against self-incrimination developed historically, and satisfies the interests of justice. Further, the position articulated by Lamer C.J.C. accords with common sense, and does not lead to the impossible position of acknowledging that the law precludes instructing juries on what would constitute an error of law.

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[91] *Supra* note 3 at 903-04.
[92] See *ibid.* at 933.
[93] See *ibid.*
[94] *Ibid.* at 902.

To summarize Lamer C.J.C.'s position, once the Crown has presented a "case to meet", the accused should legitimately be expected to respond, with the alternative being to risk the trier of fact drawing an adverse inference from silence. The trier of fact will properly draw an adverse inference where the evidence of the Crown has enveloped the accused in a "strong and cogent net-work of inculpatory facts."[95] This is a position which violates neither the accused's right to silence nor the presumption of innocence. Further, it is a position which is consonant with common sense and human nature. Silence can have real probative value and will inevitably play a factor in decision-making regardless of directions to the contrary. As such, the position articulated by Lamer C.J.C. is superior in reason and in principle, and given the opportunity, the Supreme Court of Canada should affirm that position, thereby adding weight to the logic and effectiveness of the law of evidence in Canada.

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[95] *Supra* note 53.