

Ewaryst Prokofiew (appellant) v. Her Majesty the Queen (respondent) and Attorney General of Canada, Attorney General of Quebec, Criminal Lawyers' Association of Ontario and Canadian Civil Liberties Association (intervenor)  
(33754; 2012 SCC 49; 2012 CSC 49)

**Indexed As: R. v. Prokofiew (E.)**

Supreme Court of Canada  
McLachlin, C.J.C., LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and  
Karakatsanis, JJ.  
October 12, 2012.

**Summary:**

The Crown alleged that the accused participated in a fraudulent scheme involving the fictitious sale of heavy equipment to generate HST that was then not remitted to the federal government as required.

The Ontario Superior Court convicted the accused of fraud. He was sentenced to three years' imprisonment. The accused appealed from his conviction and from his sentence.

The Ontario Court of Appeal, in a decision reported at (2010), 264 O.A.C. 174, dismissed the appeal. The accused appealed.

The Supreme Court of Canada dismissed the appeal.

Editor's Note: For another decision related to this accused, see (2008), 240 O.A.C. 77.

**Civil Rights - Topic 4947**

Presumption of innocence - Evidence and proof - Inferences - Criminal cases - Section 4(6) of the Canada Evidence Act prohibited "comment by the judge ..." regarding the failure of an accused to testify - Relying on obiter dicta in R. v. Creighton (D.J.) and Crawford (C.) (1995 S.C.C.) and R. v. Noble (S.J.) (1997 S.C.C.), a trial judge determined that s. 4(6) prevented him from telling the jury that it could not use the accused's silence at trial as evidence against him - On appeal, Doherty, J.A., of the Ont. C.A., determined that the obiter dicta in Crawford and Noble were not binding and should not be followed - The Supreme Court of Canada agreed - Section 4(6) did not prohibit a trial judge from affirming an accused's right to silence - This did not mean that such an instruction had to be given whenever an accused exercised the right to remain silent at trial - Rather, it was for the trial judge, in the exercise of his or her discretion, to provide such an instruction where there was a realistic concern that the jury might place evidential value on an accused's decision not to testify - If the instruction was given, the judge should make it clear that an accused's silence was not evidence and could not be used as a "makeweight for the Crown ..." - Further, where there was a risk of counsel misleading the jury on a co-accused's right to remain silent, trial judges would do well to spell out the governing principles and ensure that counsel's remarks conformed to those principles - It might be helpful to explain how a jury might use a lack of contradictory

evidence in deciding whether the Crown had proven its case - A jury was entitled to take into account the fact that evidence was uncontradicted and should be so instructed - However, the fact that evidence stood uncontradicted did not mean the jury had to accept it - An instruction to that effect should be given - See paragraphs 3 to 11.

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## **Courts - Topic 129**

Stare decisis - Authority of judicial decisions - Courts of superior jurisdiction - Supreme Court of Canada - Obiter dictum - [See third **Civil Rights - Topic 4947**].

## **Criminal Law - Topic 56**

General principles - Protection against self-incrimination - Comment at trial respecting accused's failure to testify - [See all **Civil Rights - Topic 4947**].

## **Criminal Law - Topic 4351**

Procedure - Charge or directions - Jury or judge alone - Directions regarding burden of proof and reasonable doubt - [See second **Civil Rights - Topic 4947**].

## **Criminal Law - Topic 4352**

Procedure - Charge or directions - Jury or judge alone - Direction on evidence generally - [See all **Civil Rights - Topic 4947**].

## **Criminal Law - Topic 4360**

Procedure - Charge or directions - Jury or judge alone - Directions regarding inferences from silence or admissions by silence or acquiescence - [See all **Civil Rights - Topic 4947**].

## **Criminal Law - Topic 4379.2**

Procedure - Charge or directions - Jury or judge alone - Directions regarding evidence admissible for limited purpose - [See **Criminal Law - Topic 5045**].

## **Criminal Law - Topic 4385.1**

Procedure - Charge or directions - Jury or judge alone - Directions regarding inadmissible evidence - [See **Criminal Law - Topic 5045**].

## **Criminal Law - Topic 5037**

Appeals - Indictable offences - Dismissal of appeal if no prejudice, substantial wrong or miscarriage results - Evidentiary error - [See **Criminal Law - Topic 5045**].

## **Criminal Law - Topic 5045**

Appeals - Indictable offences - Dismissal of appeal if no prejudice, substantial wrong or miscarriage results - What constitutes a substantial wrong or miscarriage of justice - The accused was charged with fraud - The trial judge improperly admitted various cheque stubs and a deposit book into evidence as admissible hearsay, telling the jury to be "cautious", but that the notations on the stubs (whose author was never identified) could be used to link the accused to the proceeds of the fraud - The accused was convicted - On appeal, the Crown conceded that the notations were inadmissible hearsay, but asserted that their admission could not possibly have affected the outcome - Doherty, J.A., of the Ont. C.A., agreed, finding that, even assuming that the notations could not be used as evidence against the accused, the rest of the evidence presented an overwhelming case - The Supreme Court of Canada agreed - The trial judge's error was minor - The verdict would inevitably have been the same had he not made it - Further, it was significant that

the trial judge had cautioned the jury in strong terms that the stubs were hearsay evidence and that it was not possible to cross-examine the person who had written the entries - In the face of that instruction and the other items of confirmatory evidence available to the jury, the admission of the cheque stubs and deposit book was not a significant error - The curative proviso (s. 686(1)(b)(iii) of the Criminal Code) could be applied safely to uphold the conviction - See paragraphs 27 to 34.

### **Criminal Law - Topic 5314**

Evidence - Witnesses - Inferences - From silence of accused or failure to explain - [See all **Civil Rights - Topic 4947**].

### **Statutes - Topic 501**

Interpretation - General principles - Purpose of legislation - Duty to promote object of statute - [See third **Civil Rights - Topic 4947**].

### **Cases Noticed:**

- R. v. Noble (S.J.), [1997] 1 S.C.R. 874; 210 N.R. 321; 89 B.C.A.C. 1; 145 W.A.C. 1, consd. [para. 52].
- R. v. Crawford (C.) - see R. v. Creighton (D.J.) and Crawford (C.).
- R. v. Creighton (D.J.) and Crawford (C.), [1995] 1 S.C.R. 858; 179 N.R. 161; 81 O.A.C. 359, consd. [para. 53].
- R. v. McConnell and Beer, [1968] S.C.R. 802, refd to. [para. 56].
- R. v. Avon, [1971] S.C.R. 650, refd to. [para. 56].
- R. v. Biladeau (W.) (2008), 244 O.A.C. 66; 93 O.R.(3d) 365 (C.A.), refd to. [para. 57].
- R. v. Assoun (G.E.) (2006), 244 N.S.R.(2d) 96; 774 A.P.R. 96 (C.A.), refd to. [para. 57].
- R. v. Henry (D.B.) et al., [2005] 3 S.C.R. 609; 342 N.R. 259; 376 A.R. 1; 360 W.A.C. 1; 219 B.C.A.C. 1; 361 W.A.C. 1; 2005 SCC 76, refd to. [para. 66].
- R. v. Potvin, [1989] 1 S.C.R. 525; 93 N.R. 42; 21 Q.A.C. 258, refd to. [para. 73].
- R. v. Daley - see R. v. W.J.D.
- R. v. W.J.D., [2007] 3 S.C.R. 523; 369 N.R. 225; 302 Sask.R. 4; 411 W.A.C. 4; 2007 SCC 53, refd to. [para. 86].
- R. v. Naglik (1991), 46 O.A.C. 81; 65 C.C.C.(3d) 272 (C.A.), revd. [1993] 3 S.C.R. 122; 157 N.R. 161; 65 O.A.C. 161, refd to. [para. 96].
- R. v. Pollock (R.) et al. (2004), 188 O.A.C. 37 (C.A.), refd to. [para. 96].
- R. v. Oliver (J.J.) et al. (2005), 194 O.A.C. 284 (C.A.), refd to. [para. 96].
- R. v. Jolivet (D.), [2000] 1 S.C.R. 751; 254 N.R. 1; 2000 SCC 29, refd to. [para. 105].
- R. v. Sarrazin (R.) et al., [2011] 3 S.C.R. 505; 422 N.R. 214; 284 O.A.C. 170; 2011 SCC 54, refd to. [para. 105].
- R. v. Vetovec; R. v. Gaja, [1982] 1 S.C.R. 811; 41 N.R. 606, refd to. [para. 108].
- R. v. Bevan and Griffith, [1993] 2 S.C.R. 599; 154 N.R. 245; 64 O.A.C. 165, refd to. [para. 110].
- R. v. Kehler (R.A.), [2004] 1 S.C.R. 328; 317 N.R. 30; 346 A.R. 19; 320 W.A.C. 19; 2004 SCC 11, refd to. [para. 110].
- R. v. Brooks (F.A.) (1998), 113 O.A.C. 201; 41 O.R.(3d) 661(C.A.), refd to. [para. 110].

### **Statutes Noticed:**

Canada Evidence Act, R.S.C. 1985, c. C-5, sect. 4(6) [para. 68].  
Evidence Act (Can.) - see Canada Evidence Act.

**Counsel:**

Russell Silverstein and Ingrid Grant, for the appellant;  
Jennifer M. Woollcombe and Ivan S. Bloom, Q.C., for the respondent;  
James C. Martin and Richard Kramer, for the intervener, the Attorney General of Canada;  
Sylvain Leboeuf and Gilles Laporte, for the intervener, the Attorney General of Quebec;  
P. Andras Schreck and Lucy Saunders, for the intervener, the Criminal Lawyers' Association of Ontario;  
Frank Addario, Gerald Chan and Nader R. Hasan, for the intervener, the Canadian Civil Liberties Association.

**Solicitors of Record:**

Russell Silverstein & Associate, Toronto, Ontario, for the appellant;  
Attorney General of Ontario, Toronto, Ontario, for the respondent;  
Attorney General of Canada, Halifax, Nova Scotia, for the intervener, the Attorney General of Canada;  
Attorney General of Quebec, Quebec, Quebec, for the intervener, the Attorney General of Quebec;  
Schreck Presser, Toronto, Ontario, for the intervener, the Criminal Lawyers' Association of Ontario;  
Sack Goldblatt Mitchell, Toronto, Ontario; Ruby Shiller Chan, Toronto, Ontario, for the intervener, the Canadian Civil Liberties Association.

This appeal was heard on November 8, 2011, by McLachlin, C.J.C., LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis, JJ., of the Supreme Court of Canada. On October 12, 2012, the court's judgment was released in both official languages, including the following opinions:

Moldaver, J. (Deschamps, Abella, Rothstein and Karakatsanis, JJ., concurring) - see paragraphs 1 to 36;  
Fish, J., dissenting (McLachlin, C.J.C., LeBel and Cromwell, JJ., concurring) - see paragraphs 37 to 114.

Appeal dismissed.

Editor: Sharon McCartney

**Courts - Topic 129**

Stare decisis - Authority of judicial decisions - Courts of superior jurisdiction - Supreme Court of Canada - Obiter dictum - Section 4(6) of the Canada Evidence Act prohibited "comment by the judge ..." regarding the failure of an accused to testify - Relying on obiter dicta in R. v. Creighton (D.J.) and Crawford (C.) (1995 S.C.C.) and R. v. Noble (S.J.) (1997 S.C.C.), a trial judge determined that s. 4(6) prevented him from telling the

jury that it could not use the accused's silence at trial as evidence against him - On appeal, Doherty, J.A., of the Ont. C.A., determined that the obiter dicta in Crawford and Noble were not binding and should not be followed - The Supreme Court of Canada agreed - Fish, J., dissenting in the result, noted that s. 4(6) was not at issue in either Crawford or Noble - In both cases, the comments were "brief and unnecessary to the result" - Dicta of that sort could be set aside where there were good reasons to do so - Here, the impugned dicta contradicted well-established precedents - Further, a purposive interpretation of s. 4(6) compelled the conclusion that "trial judges may inform the jury of the accused's right to silence and the protection it affords" - More specifically, trial judges could instruct the jury that, as a matter of law, no adverse inference could be drawn from the accused's failure to testify - In short, s. 4(6) did not prohibit an affirmation by the trial judge of the accused's right to silence - In appropriate circumstances, an instruction that no adverse inference might be drawn from the accused's silence at trial was not a prohibited "comment" on the accused's failure to testify within the meaning of that provision - See paragraphs 37 to 79.

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Procedure - Charge or directions - Jury or judge alone - Direction on evidence generally - Section 4(6) of the Canada Evidence Act prohibited "comment by the judge ..." regarding the failure of an accused to testify - Relying on obiter dicta in *R. v. Creighton* (D.J.) and *Crawford* (C.) (1995 S.C.C.) and *R. v. Noble* (S.J.) (1997 S.C.C.), a trial judge determined that s. 4(6) prevented him from telling the jury that it could not use the accused's silence at trial as evidence against him - On appeal, Doherty, J.A., of the Ont. C.A., determined that the obiter dicta in *Crawford* and *Noble* were not binding and should not be followed - The Supreme Court of Canada agreed - Section 4(6) did not prohibit a trial judge from affirming an accused's right to silence - This did not mean that such an instruction had to be given whenever an accused exercised the right to remain silent at trial - Rather, it was for the trial judge, in the exercise of his or her discretion, to provide such an instruction where there was a realistic concern that the jury might place evidential value on an accused's decision not to testify - If the instruction was given, the judge should make it clear that an accused's silence was not evidence and could not be used as a "makeweight for the Crown ..." - Further, where there was a risk of counsel misleading the jury on a co-accused's right to remain silent, trial judges would do well to spell out the governing principles and ensure that counsel's remarks conformed to those principles - It might be helpful to explain how a jury might use a lack of contradictory evidence in deciding whether the Crown had proven its case - A jury was entitled to take into account the fact that evidence was uncontradicted and should be so instructed - However, the fact that evidence stood uncontradicted did not mean the jury had to accept it - An instruction to that effect should be given - See paragraphs 3 to 11.

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### **Criminal Law - Topic 4360**

Procedure - Charge or directions - Jury or judge alone - Directions regarding inferences from silence or admissions by silence or acquiescence - Section 4(6) of the Canada Evidence Act prohibited "comment by the judge ..." regarding the failure of an accused to testify - Relying on obiter dicta in *R. v. Creighton* (D.J.) and *Crawford* (C.) (1995 S.C.C.) and *R. v. Noble* (S.J.) (1997 S.C.C.), a trial judge determined that s. 4(6) prevented him from telling the jury that it could not use the accused's silence at trial as evidence against him - On appeal, Doherty, J.A., of the Ont. C.A., determined that the obiter dicta in *Crawford* and *Noble* were not binding and should not be followed - The Supreme Court of Canada agreed - Fish, J., dissenting in the result, noted that s. 4(6) was not at issue in either *Crawford* or *Noble* - In both cases, the comments were "brief and unnecessary to the result" - Dicta of that sort could be set aside where there were good reasons to do so - Here, the impugned dicta contradicted well-established precedents - Further, a purposive interpretation of s. 4(6) compelled the conclusion that "trial judges may inform the jury

of the accused's right to silence and the protection it affords" - More specifically, trial judges could instruct the jury that, as a matter of law, no adverse inference could be drawn from the accused's failure to testify - In short, s. 4(6) did not prohibit an affirmation by the trial judge of the accused's right to silence - In appropriate circumstances, an instruction that no adverse inference might be drawn from the accused's silence at trial was not a prohibited "comment" on the accused's failure to testify within the meaning of that provision - See paragraphs 37 to 79.

### **Criminal Law - Topic 4379.2**

Procedure - Charge or directions - Jury or judge alone - Directions regarding evidence admissible for limited purpose - The accused was charged with fraud - The trial judge improperly admitted various cheque stubs and a deposit book into evidence as admissible hearsay, telling the jury to be "cautious", but that the notations on the stubs (whose author was never identified) could be used to link the accused to the proceeds of the fraud - The accused was convicted - On appeal, the Crown conceded that the notations were inadmissible hearsay, but asserted that their admission could not possibly have affected the outcome - Doherty, J.A., of the Ont. C.A., agreed, finding that, even assuming that the notations could not be used as evidence against the accused, the rest of the evidence presented an overwhelming case - The Supreme Court of Canada agreed - The trial judge's error was minor - The verdict would inevitably have been the same had he not made it - Further, it was significant that the trial judge had cautioned the jury in strong terms that the stubs were hearsay evidence and that it was not possible to cross-examine the person who had written the entries - In the face of that instruction and the other items of confirmatory evidence available to the jury, the admission of the cheque stubs and deposit book was not a significant error - The curative proviso (s. 686(1)(b)(iii) of the Criminal Code) could be applied safely to uphold the conviction - See paragraphs 27 to 34.

### **Criminal Law - Topic 4385.1**

Procedure - Charge or directions - Jury or judge alone - Directions regarding inadmissible evidence - The accused was charged with fraud - The trial judge improperly admitted various cheque stubs and a deposit book into evidence as admissible hearsay, telling the jury to be "cautious", but that the notations on the stubs (whose author was never identified) could be used to link the accused to the proceeds of the fraud - The accused was convicted - On appeal, the Crown conceded that the notations were inadmissible hearsay, but asserted that their admission could not possibly have affected the outcome - Doherty, J.A., of the Ont. C.A., agreed, finding that, even assuming that the notations could not be used as evidence against the accused, the rest of the evidence presented an overwhelming case - The Supreme Court of Canada agreed - The trial judge's error was minor - The verdict would inevitably have been the same had he not made it - Further, it was significant that the trial judge had cautioned the jury in strong terms that the stubs were hearsay evidence and that it was not possible to cross-examine the person who had written the entries - In the face of that instruction and the other items of confirmatory evidence available to the jury, the admission of the cheque stubs and deposit book was not a significant error - The curative proviso (s. 686(1)(b)(iii) of the Criminal Code) could be applied safely to uphold the conviction - See paragraphs 27 to 34.

### **Criminal Law - Topic 5037**

Appeals - Indictable offences - Dismissal of appeal if no prejudice, substantial wrong or miscarriage results - Evidentiary error - The accused was charged with fraud - The trial judge improperly admitted various cheque stubs and a deposit book into evidence as admissible hearsay, telling the jury to be "cautious", but that the notations on the stubs (whose author was never identified) could be used to link the accused to the proceeds of the fraud - The accused was convicted - On appeal, the Crown conceded that the notations were inadmissible hearsay, but asserted that their admission could not possibly have affected the outcome - Doherty, J.A., of the Ont. C.A., agreed, finding that, even assuming that the notations could not be used as evidence against the accused, the rest of the evidence presented an overwhelming case - The Supreme Court of Canada agreed - The trial judge's error was minor - The verdict would inevitably have been the same had he not made it - Further, it was significant that the trial judge had cautioned the jury in strong terms that the stubs were hearsay evidence and that it was not possible to cross-examine the person who had written the entries - In the face of that instruction and the other items of confirmatory evidence available to the jury, the admission of the cheque stubs and deposit book was not a significant error - The curative proviso (s. 686(1)(b)(iii) of the Criminal Code) could be applied safely to uphold the conviction - See paragraphs 27 to 34.

### **Criminal Law - Topic 5314**

Evidence - Witnesses - Inferences - From silence of accused or failure to explain - Section 4(6) of the Canada Evidence Act prohibited "comment by the judge ..." regarding the failure of an accused to testify - Relying on obiter dicta in *R. v. Creighton* (D.J.) and *Crawford* (C.) (1995 S.C.C.) and *R. v. Noble* (S.J.) (1997 S.C.C.), a trial judge determined that s. 4(6) prevented him from telling the jury that it could not use the accused's silence at trial as evidence against him - On appeal, Doherty, J.A., of the Ont. C.A., determined that the obiter dicta in *Crawford* and *Noble* were not binding and should not be followed - The Supreme Court of Canada agreed - Section 4(6) did not prohibit a trial judge from affirming an accused's right to silence - This did not mean that such an instruction had to be given whenever an accused exercised the right to remain silent at trial - Rather, it was for the trial judge, in the exercise of his or her discretion, to provide such an instruction where there was a realistic concern that the jury might place evidential value on an accused's decision not to testify - If the instruction was given, the judge should make it clear that an accused's silence was not evidence and could not be used as a "makeweight for the Crown ..." - Further, where there was a risk of counsel misleading the jury on a co-accused's right to remain silent, trial judges would do well to spell out the governing principles and ensure that counsel's remarks conformed to those principles - It might be helpful to explain how a jury might use a lack of contradictory evidence in deciding whether the Crown had proven its case - A jury was entitled to take into account the fact that evidence was uncontradicted and should be so instructed - However, the fact that evidence stood uncontradicted did not mean the jury had to accept it - An instruction to that effect should be given - See paragraphs 3 to 11.

### **Criminal Law - Topic 5314**

Evidence - Witnesses - Inferences - From silence of accused or failure to explain - Section 4(6) of the Canada Evidence Act prohibited "comment by the judge ..." regarding the failure of an accused to testify - A trial judge determined that s. 4(6) prevented him from telling the jury that it could not use the accused's silence at trial as evidence against him - The accused appealed from his conviction, asserting that the failure to give that instruction constituted reversible error - Doherty, J.A., of the Ont. C.A., dismissed the appeal, finding that, taking into account the entirety of the instructions, the jury would have understood that the Crown could prove the accused's guilt based only on the evidence and that the accused's silence at trial could not be used to infer his guilt - The Supreme Court of Canada agreed - The trial judge made it clear to the jury that the Crown carried the burden of proof throughout the proceedings and that there was no obligation on the part of the accused to present evidence or prove anything - The trial judge also emphasized that the jury was to base its verdict on the evidence given during the trial and nothing else - Importantly, he defined "evidence" as being "[o]nly things that are admitted, the exhibits and the things witnesses say in testimony before you" - The jury would have understood from this that the accused's silence did not constitute evidence, and, as such, it could not be used in determining his guilt - The instructions as a whole were adequate - See paragraphs 12 to 26.

#### **Criminal Law - Topic 5314**

Evidence - Witnesses - Inferences - From silence of accused or failure to explain - Section 4(6) of the Canada Evidence Act prohibited "comment by the judge ..." regarding the failure of an accused to testify - Relying on obiter dicta in *R. v. Creighton* (D.J.) and *Crawford* (C.) (1995 S.C.C.) and *R. v. Noble* (S.J.) (1997 S.C.C.), a trial judge determined that s. 4(6) prevented him from telling the jury that it could not use the accused's silence at trial as evidence against him - On appeal, Doherty, J.A., of the Ont. C.A., determined that the obiter dicta in *Crawford* and *Noble* were not binding and should not be followed - The Supreme Court of Canada agreed - Fish, J., dissenting in the result, noted that s. 4(6) was not at issue in either *Crawford* or *Noble* - In both cases, the comments were "brief and unnecessary to the result" - Dicta of that sort could be set aside where there were good reasons to do so - Here, the impugned dicta contradicted well-established precedents - Further, a purposive interpretation of s. 4(6) compelled the conclusion that "trial judges may inform the jury of the accused's right to silence and the protection it affords" - More specifically, trial judges could instruct the jury that, as a matter of law, no adverse inference could be drawn from the accused's failure to testify - In short, s. 4(6) did not prohibit an affirmation by the trial judge of the accused's right to silence - In appropriate circumstances, an instruction that no adverse inference might be drawn from the accused's silence at trial was not a prohibited "comment" on the accused's failure to testify within the meaning of that provision - See paragraphs 37 to 79.

#### **Statutes - Topic 501**

Interpretation - General principles - Purpose of legislation - Duty to promote object of statute - Section 4(6) of the Canada Evidence Act prohibited "comment by the judge ..." regarding the failure of an accused to testify - Relying on obiter dicta in *R. v. Creighton* (D.J.) and *Crawford* (C.) (1995 S.C.C.) and *R. v. Noble* (S.J.) (1997 S.C.C.), a trial judge determined that s. 4(6) prevented him from telling the jury that it could not use the

accused's silence at trial as evidence against him - On appeal, Doherty, J.A., of the Ont. C.A., determined that the obiter dicta in Crawford and Noble were not binding and should not be followed - The Supreme Court of Canada agreed - Fish, J., dissenting in the result, noted that s. 4(6) was not at issue in either Crawford or Noble - In both cases, the comments were "brief and unnecessary to the result" - Dicta of that sort could be set aside where there were good reasons to do so - Here, the impugned dicta contradicted well-established precedents - Further, a purposive interpretation of s. 4(6) compelled the conclusion that "trial judges may inform the jury of the accused's right to silence and the protection it affords" - More specifically, trial judges could instruct the jury that, as a matter of law, no adverse inference could be drawn from the accused's failure to testify - In short, s. 4(6) did not prohibit an affirmation by the trial judge of the accused's right to silence - In appropriate circumstances, an instruction that no adverse inference might be drawn from the accused's silence at trial was not a prohibited "comment" on the accused's failure to testify within the meaning of that provision - See paragraphs 37 to 79.