SUPREME COURT OF CANADA

CITATION: R. *v.* B.F., 2025 SCC 41

APPEALS HEARD: May 22, 2025
JUDGMENT RENDERED: December 5, 2025
DOCKET: 41420

BETWEEN:

His Majesty The King
Appellant

and

B.F.
Respondent

AND BETWEEN:

B.F.
Appellant

and

His Majesty The King
Respondent

- and -

Attorney General of Canada,
Canadian Civil Liberties Association and
Inclusion Canada
Interveners

CORAM: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

REASONS FOR JUDGMENT: (paras. 1 to 92)	O'Bonsawin J. (Côté, Rowe, Martin, Kasirer and Jamal JJ. concurring)
JOINT REASONS DISSENTING IN PART: (paras. 93 to 151)	Karakatsanis and Moreau JJ. (Wagner C.J. concurring)

His Majesty The King *Appellant*

v.

B.F. *Respondent*

- and -

B.F. *Appellant*

v.

His Majesty The King *Respondent*

and

Attorney General of Canada,
Canadian Civil Liberties Association and
Inclusion Canada *Interveners*

Indexed as: R. *v.* B.F.

2025 SCC 41

File No.: 41420.

2025: May 22; 2025: December 5.

Present: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law — Charge to jury — Attempt to commit murder — Defence theory — Air of reality — Suicide attempt — Accused convicted by jury of attempted murder of her child and of her mother and of aggravated assault of her child after all three were found unconscious due to insulin overdose — Court of Appeal upholding convictions for offences against child but ordering new trial with respect to conviction for attempted murder of mother on basis that trial judge's jury instructions wrongly permitted jury to convict accused based on acts that could instead constitute distinct offence of aiding suicide of accused's mother — Whether trial judge made reviewable errors in instructing jury.

The accused, her 19-month-old child and the accused's mother were found unconscious in their family apartment. All three had been injected with large doses of insulin. The accused and her mother made a full recovery, but the child suffered life-altering injuries. The accused was charged with two counts of attempted murder by administering a noxious substance, contrary to s. 239(1)(b) of the *Criminal Code*, and two counts of aggravated assault, contrary to s. 268(2). At the accused's trial before a jury, the Crown's case rested on the theory that the accused, a nurse, had both the

motive — ongoing family law proceedings for access to and custody of the child — and opportunity to inject her mother and child with insulin before attempting to end her own life. Emptied insulin pens were found in the apartment, as well as a handwritten letter that the Crown suggested was the accused's suicide note. One of the defence theories was that responsibility lay with the accused's mother, who could have injected the child, the accused and herself with insulin.

Regarding the count for the attempted murder of the accused's mother, among other instructions, the trial judge instructed the jury that the Crown could discharge its onus with respect to the *actus reus* with proof beyond a reasonable doubt that the accused administered the substance by injecting the insulin into her mother herself, or that the accused procured the insulin pens and provided them to her mother with the intent that her mother would use them to inject herself. He added that it did not matter if the mother was a willing participant in any or all of the actions undertaken by the accused. For the counts concerning the child, the trial judge instructed the jury, after other instructions, on the alternative ways the accused's guilt could be established should they accept that the accused's mother was the one to inject the insulin.

The accused was convicted of attempted murder of her child and of her mother and of aggravated assault of her child. The Court of Appeal ordered a new trial on the count of attempted murder of the mother, holding that the jury needed to be instructed on the distinction between attempted murder under s. 239 of the *Criminal Code* and aiding suicide under s. 241(1)(b). Specifically, in its view, the accused could

have provided the insulin to her mother, who could have injected herself in an attempt to die by suicide, and the mother's willing participation and desire to die would have been relevant to whether the accused was guilty of her attempted murder. The Court of Appeal did not disturb the accused's convictions related to the child.

Held (Wagner C.J. and Karakatsanis and Moreau JJ. dissenting in part)*:* The Crown's appeal should be allowed and the accused's appeal should be dismissed.

Per Côté, Rowe, Martin, Kasirer, Jamal and **O'Bonsawin** JJ.: The accused's conviction for the attempted murder of her mother should be restored. The jury did not need to be instructed on the distinction between attempted murder and aiding suicide. Aiding suicide was neither charged nor is it a lesser included offence, and there was no air of reality to a scenario in which the accused aided her mother in self-administering the insulin with an intention to end her own life. As for the accused's convictions for attempted murder and aggravated assault of her child, they should be upheld. The trial judge properly equipped the jury to decide the accused's guilt on all relevant charges.

Courts must adopt a functional approach when reviewing jury instructions for legal error. The central consideration is whether the instructions properly equipped the jury to decide the case according to the law and the evidence. A properly equipped jury can be understood as one that is both accurately and sufficiently instructed, not perfectly instructed. To determine if an instruction was accurate, an appellate court must ask whether the jury had an accurate understanding of the law. To determine if an

instruction was sufficient, an appellate court must consider whether the instruction was required, and, if so, whether it was provided in sufficient detail for the jury to undertake its task. Both the accuracy and sufficiency of the instructions must be considered in the context of the circumstances of the trial as a whole, including the evidence, the closing arguments of counsel, and the silence of counsel.

No view is expressed on whether someone voluntarily attempting to end their own life precludes all liability for attempted murder in respect of that attempt. Even if this were correct, it is only where the theory that the victim attempted suicide has an air of reality that the jury would need to be instructed that a person charged with attempted murder could be not guilty by reason of a suicide attempt.

Trial judges must instruct the jury on each required element of the offences charged in every case, regardless of the circumstances, but must only instruct on defences and included offences where they have an air of reality. Asking whether there is an air of reality involves a contextual assessment as to whether the necessary factual inferences are available on a reasonable view of the evidence. Any defence theory realistically available on the totality of the evidence should be left with the jury. The air of reality threshold serves as an important screening mechanism, ensuring that theories with no real evidentiary foundation are withheld from the jury, as instructing the jury on such theories would only serve to cause confusion and needlessly lengthen the judge's charge.

Analogously, even if it were true that an accused is not guilty of attempted murder where a victim voluntarily self-administers with the intent to end their own life, this theory must be supported by an evidentiary foundation and a trial judge would only need to instruct the jury on that theory if it had an air of reality on the record. Confirming that an air of reality would be required is important because it may be difficult in a given case to prove the specific intent of the victim of a murder attempt. An accused must not be allowed to escape criminal liability by baldly asserting the victim intended to bring about their own death.

Where the inquiry into an air of reality involves circumstantial evidence, a limited weighing of the evidence is required. This involves identifying the array of factual inferences that could reasonably be drawn, rather than identifying inferences that are more plausible than others. It is not enough for the judge to focus on whether there is some evidence that could raise an inference. The judge must go on to ask whether the evidence is sufficient such that a properly instructed jury could reasonably arrive at the relevant conclusion. The positions of the parties may be relevant context, in particular where the accused makes concessions or chooses not to lead a defence at trial, as this may confirm that the defence has no air of reality, but this should not be misunderstood to mean that statements made by counsel at trial can give an air of reality to a theory that is not reasonably available on the evidence.

In the instant case, adopting the functional approach to review of jury instructions, the jury was properly equipped to decide the accused's guilt on the

attempted murder of her mother. Since the accused was not charged with aiding suicide and this offence is not included in the offence of attempted murder in this case, the jury did not need to consider whether the accused was guilty of this offence. Further, since there was no air of reality to the theory that the accused aided her mother in self-administering the insulin with the intent to voluntarily end her own life, the trial judge was right not to address it in his jury instructions.

In considering the evidence about the circumstances surrounding the purported suicide attempt, which informs whether it has an air of reality, the key question is whether the conclusions that the accused's mother self-administered the insulin and did so voluntarily, intending to end her own life, are both available on the same reasonable view of the evidence as a whole. The circumstantial evidence relied on by the accused is that (1) there was no evidence of a struggle between the accused and her mother in the apartment; (2) the accused could not physically overpower her mother; and (3) the handwritten letter that the Crown suggested was a suicide note was co-authored by both of them. Taking this evidence at its most favourable, considered alongside the remainder of the evidence and reading the record as a whole, there is no air of reality to the theory that the accused's mother had suicidal intent. There is no testimony from the mother or anyone else suggesting such intent and it would be speculative to suggest that the handwritten letter evidences that intent. This assessment of the totality of the evidence is further supported by the circumstances at trial, in which neither party advanced the theory that the accused and her mother had each injected themselves with insulin with the intent to end their own lives. The trial judge's

instructions provided the jury with everything required to decide whether the accused was guilty of the attempted murder of her mother on the record.

As well, the trial judge properly equipped the jury to decide the accused's guilt on the offences of attempted murder and aggravated assault of the child. For each offence, the jury was accurately instructed on the available verdicts in light of the defence theory that the accused's mother, acting independently of the accused, injected the child with insulin. Moreover, the trial judge accurately instructed the jury on the *mens rea* and *actus reus* of the offences, including in a scenario in which it was the accused's mother who actually injected the child with insulin. Finally, the trial judge adequately summarized the evidence concerning the procurement of insulin pens and rightly invited the jury to draw its own conclusion on the evidence.

Per Wagner C.J. and **Karakatsanis** and **Moreau** JJ. (dissenting in part): There is agreement with the majority that the accused's appeal from her convictions regarding the child should be dismissed. However, the Crown's appeal should also be dismissed. A new trial is necessary on the charge of attempted murder of the accused's mother because there was an air of reality to the defence's theory that the accused aided her mother's suicide attempt. The trial judge erred in law by not instructing the jury on the legal significance of this theory of liability to the *actus reus* analysis of the attempted murder of the accused's mother.

A trial judge has a positive duty to instruct the jury on all relevant questions of law that arise on the evidence, whether or not a party has raised the issue. This duty

arises most commonly in the context of defences, but also requires the trial judge to explain the legal significance of other matters that have an air of reality, because it is an error of law to omit any instructions the jury needs to properly undertake its task. The air of reality test simply requires that an inference be available on the whole of the evidence. It is a legal error to identify an inference that seems more plausible than others, and then reject the less plausible inferences as unreasonable. Doing so oversteps the judge's limited role in assessing an air of reality, a low evidentiary threshold, and involves weighing the substantive merits. If a viable theory is available on the evidence, it must be submitted to the jury's thoughtful consideration in the absence of compelling reasons against doing so.

In the instant case, the circumstantial evidence grounds an air of reality to the factual inference that the accused's mother injected herself with insulin intending to commit suicide. While there is no direct evidence that the accused deceived or coerced her mother into self-administering the insulin, on a common-sense view of the evidence, it seems at least as likely that her mother injected herself with insulin intending to die as that she did so without that intent. Further, in the context of the charge for attempted murder of the child, there was an air of reality to the theory that the accused's mother intended to kill the child, the accused, and then herself. Therefore, there must also have been an air of reality to the theory that the accused's mother intended to inject herself to bring about her own death. Further, because the jury acquitted the accused of aggravated assault of her mother, it can be inferred from that verdict that the jury had a reasonable doubt about whether the accused physically

injected her mother with insulin. Given the Crown's alternative theory, it can also be inferred that the jury found beyond a reasonable doubt that the accused administered the insulin by procuring it and instructing her mother on how to inject herself. Therefore, the trial judge's instruction that it did not matter if the jury found that the accused's mother was a willing participant in any or all actions undertaken by the accused was inaccurate. The inference that the accused's mother injected herself with insulin in a suicide attempt required further jury instructions because it directly impacted the *actus reus* for attempted murder. The trial judge was therefore required to make the distinction between the offences of attempted murder and aiding suicide clear to the jury.

Parliament deliberately chose to create separate offences for culpable homicide (and attempted murder) and aiding suicide, the latter carrying a lesser moral blameworthiness than the former. Because the *actus reus* of culpable homicide, in all its different forms, is causing the death of another, causation will be a key issue when assessing *actus reus*. The one standard of causation for all forms of culpable homicide asks whether the actions of the accused were a significant contributing cause of death. This standard requires proof of both factual and legal causation.

The legal distinction in the elements of the offences of aiding suicide and culpable homicide arises squarely in the context of legal causation when establishing the *actus reus*. Legal causation is an assessment of moral blameworthiness and whether an accused should be held criminally responsible for the consequences of their actions.

It also considers the issue of when an intervening act can break the chain of causation. If the deceased took their own life autonomously and of their own free will, this independent choice to act to cause their own death may sever an accused's legal causation for culpable homicide because those circumstances reduce an accused's moral blameworthiness. An accused's actions will therefore not be a significant contributing cause of death, and an acquittal for any culpable homicide charge, or for an inchoate offence such as attempted murder, should follow. Depending on the nature and extent of the accused's actions, they may however be liable for aiding suicide. But where the accused's actions somehow actively undermined or overpowered the deceased's autonomous choice whether to commit suicide, then the suicide may no longer qualify as an independent intervening act, and causation for culpable homicide may be established.

In the instant case, given the air of reality to the theory that the accused's mother injected herself with the intent to commit suicide, the trial judge was obliged to instruct the jury as to whether her choice had severed the chain of causation, such that the accused would no longer have been a significant contributing cause of her mother's death. The jury should have been instructed that if it found that the accused's mother's choice was independent and autonomous, then it should acquit the accused of attempted murder.

Cases Cited

By O'Bonsawin J.

Applied: *R. v. Abdullahi*, 2023 SCC 19; *R. v. Pan*, 2025 SCC 12; **considered:** *R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3; **referred to:** *R. v. Calnen*, 2019 SCC 6, [2019] 1 S.C.R. 301; *R. v. Lozada*, 2024 SCC 18; *R. v. Goforth*, 2022 SCC 25, [2022] 1 S.C.R. 715; *R. v. Jacquard*, [1997] 1 S.C.R. 314; *R. v. Wolfe*, 2024 SCC 34; *R. v. G.R.*, 2005 SCC 45, [2005] 2 S.C.R. 371; *R. v. Gagnon* (1993), 84 C.C.C. (3d) 143; *Mailhot v. R.*, 2012 QCCA 964, rev'd 2013 SCC 17, [2013] 2 S.C.R. 96; *R. v. Ali*, 2021 ONCA 362, 156 O.R. (3d) 81; *R. v. Park*, [1995] 2 S.C.R. 836; *R. v. Osolin*, [1993] 4 S.C.R. 595; *R. v. Arcuri*, 2001 SCC 54, [2001] 2 S.C.R. 828; *R. v. Chalmers*, 2009 ONCA 268, 243 C.C.C. (3d) 338; *R. v. Fournier*, 2023 ONCA 435; *R. v. Haas*, 2016 MBCA 42, 326 Man. R. (2d) 302; *R. v. C.W.* (2006), 209 O.A.C. 1; *R. v. Jordan* (1991), 4 B.C.A.C. 121; *R. v. Kelsie*, 2019 SCC 17, [2019] 2 S.C.R. 101; *R. v. Chacon-Perez*, 2022 ONCA 3, 159 O.R. (3d) 481; *Lefebvre v. R.*, 2021 QCCA 1548; *R. v. Williams*, 2025 ONCA 467, 450 C.C.C. (3d) 336; *R. v. Ancio*, [1984] 1 S.C.R. 225; *United States of America v. Dynar*, [1997] 2 S.C.R. 462; *R. v. Carson*, 2018 SCC 12, [2018] 1 S.C.R. 269; *R. v. Boone*, 2019 ONCA 652, 56 C.R. (7th) 432; *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96.

By Karakatsanis and Moreau JJ. (dissenting in part)

R. v. Pickton, 2010 SCC 32, [2010] 2 S.C.R. 198; *R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3; *Pappajohn v. The Queen*, [1980] 2 S.C.R. 120; *R. v. Pan*, 2025 SCC 12; *R. v. Ancio*, [1984] 1 S.C.R. 225; *R. v. Pappas*, 2013 SCC 56, [2013] 3 S.C.R. 452; *R. v. Osolin*, [1993] 4 S.C.R. 595; *R. v. Tatton*, 2015 SCC 33, [2015] 2 S.C.R.

574; *R. v. Suthakaran*, 2024 ONCA 50, 433 C.C.C. (3d) 175; *R. v. Martineau*, [1990] 2 S.C.R. 633; *United States of America v. Dynar*, [1997] 2 S.C.R. 462; *R. v. Nette*, 2001 SCC 78, [2001] 3 S.C.R. 488; *R. v. Maybin*, 2012 SCC 24, [2012] 2 S.C.R. 30; *R. v. Briscoe*, 2010 SCC 13, [2010] 1 S.C.R. 411; *R. v. Bernard*, [1988] 2 S.C.R. 833; *R. v. Brown*, 2022 SCC 18, [2022] 1 S.C.R. 374; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *R. v. Creighton*, [1993] 3 S.C.R. 3; *R. v. Harbottle*, [1993] 3 S.C.R. 306; *Smithers v. The Queen*, [1978] 1 S.C.R. 506; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330; *R. v. G.F.*, 2021 SCC 20, [2021] 1 S.C.R. 801; *R. v. Abdullahi*, 2023 SCC 19.

Statutes and Regulations Cited

Criminal Code, R.S.C. 1985, c. C-46, ss. 21, 24, 222(1), (5), 229, 233, 234, 235, 236, 239, 241, 241.1 to 241.4, 268(2), 662, 724(2)(b).

Criminal Code, 1892, S.C. 1892, c. 29, ss. 218, 220, 227 to 230, 237, 238.

Authors Cited

Blackstone, William. *Commentaries on the Laws of England*, Book IV, 8th ed. Oxford: Clarendon Press, 1769.

Ewaschuk, E. G. *Criminal Pleadings & Practice in Canada*, 3rd ed. Toronto: Thomson Reuters, 2025 (loose-leaf updated November 2025, release 8).

Penney, Steven, Vincenzo Rondinelli and James Stribopoulos. *Criminal Procedure in Canada*, 3rd ed. Toronto: LexisNexis, 2022.

Roach, Kent. *Criminal Law*, 8th ed. Toronto: Irwin Law, 2022.

Vauclair, Martin, Tristan Desjardins and Pauline Lachance. *Traité général de preuve et de procédure pénales 2025*, 32nd ed. Montréal: Yvon Blais, 2025.

Williams, Glanville. “Causation in Homicide”, [1957] *Crim. L.R.* 429.

APPEALS from a judgment of the Ontario Court of Appeal (van Rensburg, George and Favreau JJ.A.), 2024 ONCA 511, 439 C.C.C. (3d) 421, [2024] O.J. No. 2899 (Lexis), 2024 CarswellOnt 9547 (WL), setting aside the conviction of B.F. for the attempted murder of I.F. and ordering a new trial, and affirming the convictions of B.F. for the attempted murder and aggravated assault of E. Appeal by His Majesty The King allowed, Wagner C.J. and Karakatsanis and Moreau JJ. dissenting. Appeal by B.F. dismissed.

Deborah Krick and *Katie Doherty*, for the appellant/respondent His Majesty The King.

Matthew Gourlay and *Elina Marinosyan*, for the respondent/appellant B.F.

Jeffrey G. Johnston and *Justine Malone*, for the intervener Attorney General of Canada.

James Foy and *Frank Addario*, for the intervener Canadian Civil Liberties Association.

Sarah Rankin, for the intervener Inclusion Canada.

The judgment of Côté, Rowe, Martin, Kasirer, Jamal and O'Bonsawin JJ. was delivered by

O'BONSAWIN J. —

I. Overview

[1] B.F., her 19-month-old daughter, E., and her mother, I.F., were found unconscious in their family apartment. All three had been injected with large doses of insulin. All three survived, with B.F. and I.F. making a full recovery. E., however, suffered life-altering injuries and requires intensive medical care for the rest of her life.

[2] A jury convicted B.F. of the attempted murder of E. and I.F., as well as the aggravated assault of E. The Court of Appeal found that the trial judge's instructions wrongly permitted the jury to convict B.F. of the attempted murder of I.F. based on acts that could instead constitute the distinct offence of aiding suicide under s. 241(1)(b) of the *Criminal Code*, R.S.C. 1985, c. C-46. Specifically, B.F. could have provided the insulin to I.F., who could have injected herself in an attempt to die by suicide. As a result, the Court of Appeal set aside B.F.'s attempted murder conviction regarding I.F. and ordered a new trial on that count. The Court of Appeal did not disturb B.F.'s convictions related to E.

[3] The Crown and B.F. appeal to this Court. Both appeals concern the adequacy of the trial judge's jury instructions.

[4] The Crown seeks to restore B.F.'s conviction for the attempted murder of I.F. It argues that B.F. could be found guilty of attempted murder even if I.F. had

injected herself with insulin, provided that B.F. procured and provided the insulin to I.F. with the intent that I.F. would inject herself, and that B.F. meant to kill I.F. when taking these active steps. In the alternative, the Crown contends that there was no air of reality to the theory that I.F. intended to die by suicide, such that the trial judge's failure to instruct on this theory was not an error (transcript, at pp. 5-8).

[5] B.F. asks this Court to set aside her remaining convictions for the attempted murder and aggravated assault of E. and to order a new trial. She argues that the trial judge made various errors when instructing the jury on those offences.

[6] For the reasons that follow, I would allow the Crown's appeal, restore B.F.'s conviction for the attempted murder of I.F., and dismiss B.F.'s appeal.

[7] In my view, the Court of Appeal unnecessarily complicated this matter by holding that the jury needed to be instructed on the distinction between attempted murder under s. 239 of the *Criminal Code* and aiding suicide under s. 241(1)(b). The distinct offence of aiding suicide was neither charged nor is it a lesser included offence. Further, there was no air of reality to a scenario in which I.F. self-administered the insulin with an intention to end her own life. The trial judge was therefore correct not to address this scenario in his instructions, which properly equipped the jury to decide B.F.'s guilt on all relevant charges. The question of the legal relationship between attempted murder and aiding suicide has no bearing on the appeals.

II. Background

[8] B.F. worked as a surgical nurse. In 2016, she married A.N. after a period of dating and they had a daughter, E. The couple then separated when E. was nearly three months old, prompting B.F. to move into her parents' apartment with E.

[9] B.F. and A.N.'s relationship continued to deteriorate after their separation, resulting in concurrent criminal and family law proceedings. Between May and June 2018, A.N. and B.F. each filed separate applications for access to and custody of E. Around the same time, A.N. pleaded guilty to uttering threats and criminal harassment against B.F. In June 2019, B.F. was granted interim sole custody of E., while A.N. was granted limited supervised access. Dissatisfied with this outcome, B.F. sought a stay of the order and leave to appeal the decision.

[10] On the morning of June 12, 2019, B.F.'s father, who was out of town, became increasingly concerned after repeated failed attempts to contact his daughter and wife. Fearing something was wrong, he contacted a neighbour, with whom he had left keys to the apartment, to check on them. After entering the apartment, the neighbour found E. unconscious in her crib, along with B.F. and I.F. unconscious on B.F.'s bed. Emergency responders, who arrived in the apartment shortly thereafter, discovered five emptied insulin pens.

[11] B.F. and I.F. have since made full recoveries. E., however, suffered devastating and life-altering harm. She now faces a shortened life expectancy and a poor quality of life, suffering permanent brain damage and irreparable damage to multiple other organs. She will require intensive medical care for the rest of her life.

III. Judicial History

A. *Ontario Superior Court of Justice (Dunphy J.)*

[12] B.F. was charged with two counts of attempted murder by administering a noxious substance, contrary to s. 239(1)(b) of the *Criminal Code*, and two counts of aggravated assault, contrary to s. 268(2) of the *Criminal Code*, in relation to E. and I.F. Two counts of administering a noxious substance with the intent to endanger life or cause bodily harm, contrary to s. 246(b) of the *Criminal Code*, were withdrawn as duplicative during the trial.

[13] The Crown's case rested on the theory that B.F. had both the motive and opportunity to inject I.F. and E. with insulin before attempting to end her own life. The Crown suggested that the distress of the ongoing family law proceedings provided a motive, while the opportunity arose from B.F.'s access to insulin pens, and knowledge of how to use them, through her employment as a nurse.

[14] The defence theories were that responsibility lay either with A.N. or, alternatively, with I.F. It was suggested that I.F. shared the same motive as B.F. As for A.N.'s motive, the defence alleged that he had a history of uttering threats against B.F. and was determined to prevent B.F. from proceeding with her family law appeal.

[15] The jury heard that B.F., I.F., and E. had all been injected with insulin. E. had several visible injection marks, while B.F. and I.F. showed no visible marks. There

was evidence that I.F. and E. were administered doses that would have proved fatal if not for the intervention of the emergency responders.

[16] The jury heard that emergency responders found several needle cartridges and depressed syringes alongside five emptied insulin pens in the apartment. They also discovered government-issued identification cards of both B.F. and I.F. and a notebook opened to a handwritten letter on the television stand in the living room. The Crown suggested that the handwritten letter was B.F.'s suicide note.

[17] The letter, signed by B.F., stated in part: "I gave my child everything in my power, I dedicated my life to that child and I love her with my whole heart and soul. It is heartbreaking that because I am more intelligent than most of your herd of sheep, your system has decided to punish my child. But know that in the end I will never allow for anyone to abduct or hurt my baby" (A.R., vol. II, at pp. 150-53).

[18] B.F. and I.F. both testified. B.F. described her troubled relationship with A.N., including issues related to drug use as well as emotional and physical abuse. She testified about emails she had sent to the Prime Minister as a plea for help with her family law proceedings against A.N. While B.F. acknowledged writing the letter, she denied having left the notebook open on the television stand. She maintained that the letter was not a suicide note, but rather further correspondence intended for the Prime Minister in response to the prior email correspondence relating to the family law proceedings. B.F. also testified that, although disappointed by the family law

proceedings, she was not upset by the access decision, nor did she harbour any hatred toward A.N.

[19] B.F. denied having taken insulin pens from her workplace and claimed she had no knowledge of how they came to be in her apartment. She testified that she did not inject either E. or I.F. with insulin, nor did she believe her mother injected her or her daughter. B.F. recalled that her final memory before losing consciousness was lying in bed, playing with E. and I.F.

[20] I.F. testified that she never saw insulin pens or syringes in the apartment, nor did she see her daughter administering insulin to anyone. Like B.F., her final memory before losing consciousness was lying in bed with her daughter and granddaughter. I.F. also claimed that she had authored the entire letter found on the television stand. She dictated its contents to B.F., who then transcribed it into the notebook. She testified that the letter was intended as a correspondence to a United Nations campaign.

[21] Following a jury trial, B.F. was found guilty of both counts of attempted murder. She was also convicted of aggravated assault in relation to E., but acquitted of the same in relation to I.F.

[22] The trial judge stayed the proceedings in relation to aggravated assault as duplicative. He imposed a sentence of life imprisonment without eligibility for parole

for 10 years for the attempted murder of E., and a concurrent 10-year sentence for the attempted murder of I.F.

B. *Court of Appeal for Ontario, 2024 ONCA 511, 439 C.C.C. (3d) 421 (van Rensburg, George and Favreau JJ.A.)*

[23] B.F. appealed against her convictions and sentence. The Court of Appeal allowed the appeal in part, setting aside her conviction for the attempted murder of I.F. and ordering a new trial on that count. It declined to disturb the conviction for the attempted murder of E. and the associated sentence.

[24] The Court of Appeal found that the trial judge's instructions had wrongly left it open to the jury to convict B.F. of attempted murder based on acts that could instead constitute the distinct offence of aiding suicide under s. 241(1)(b) of the *Criminal Code*. Specifically, the Court of Appeal took issue with this passage of the trial judge's instructions, addressing the *actus reus* of the attempted murder of I.F.:

> The Crown may satisfy its onus with respect to this essential element with proof beyond a reasonable doubt that [B.F.] administered the substance by injecting the insulin into [I.F.] herself. The Crown may also discharge its onus with respect to this essential element with proof beyond a reasonable doubt that [B.F.] administered the substance to [I.F.] if she procured the insulin pen or pens and provided them to [I.F.] with the intent that [I.F.] would use them to inject herself. . . . It does not matter if you find that [I.F.] was a willing participant in any or all of the actions undertaken by [B.F.].
>
> (A.R., vol. I, at p. 106)

[25] The Court of Appeal determined that, had I.F. self-administered the insulin, her willing participation and desire to die would have been relevant to whether B.F. was guilty of the attempted murder of I.F. On the Court of Appeal's view of the law, where "the will of the person committing (or attempting to commit) suicide is operating", the trier of fact must consider not only whether the accused supplied the substance, but also whether the accused interfered with the person's independent will to self-administer that substance (para. 43). If the latter condition is not met, the accused may be guilty of aiding a suicide attempt rather than attempted murder. Accordingly, the Court of Appeal held that the trial judge erred by instructing the jury that it did not matter whether I.F. was a willing participant in injecting the insulin, as it permitted the jury to overlook this distinction.

[26] This error in the instructions did not affect the attempted murder conviction regarding E., who, given her young age, could not have self-administered the insulin. The Court of Appeal summarily dismissed the other grounds of appeal.

IV. Issues and Positions of the Parties

A. *The Crown's Appeal*

[27] The Crown appeals, seeking to restore B.F.'s conviction for the attempted murder of I.F. (A.F., at para. 109). It argues that, irrespective of whether I.F. self-administered the insulin, the trial judge properly instructed the jury that B.F. could still be guilty of attempted murder based on her active involvement in providing the insulin

and assisting in its administration, establishing the *actus reus* of this offence (paras. 104-5). The Crown further argues that the trial judge correctly instructed the jury on the *mens rea* for attempted murder, namely that B.F. specifically intended to kill I.F. when she undertook those actions (para. 106).

[28] In the alternative, the Crown argues that this Court could recognize counselling or aiding suicide under s. 241 of the *Criminal Code* as a partial defence to culpable homicide. In its view, the "air of reality" test would serve as a robust screening mechanism to determine whether the partial defence should be put to the jury (Crown's Condensed Book, vol. I, at pp. 1-2). In this case, the Crown submits that the jury did not require additional instructions on suicide because there was no air of reality to the theory that I.F. intended to die by suicide (transcript, at pp. 5-7).

[29] B.F. responds that the Court of Appeal appropriately found that the jury was improperly instructed on this count. She argues that a reasonable possibility that I.F. had injected herself with insulin, without any evidence that B.F. misled or coerced I.F., would preclude a conviction for attempted murder (R.F., at paras. 92-94). Instead, the applicable offence would have been aiding suicide, with which she was not charged. B.F. says that ordinary screening mechanisms, such as the "air of reality" test, would serve to prevent unwarranted acquittals based on false claims of suicidal intent (para. 68). However, she maintains that there is an air of reality to I.F.'s suicidal intent (transcript, at pp. 69-71). In B.F.'s view, the trial judge's instructions erroneously permitted the jury to convict her of the attempted murder of I.F., even where I.F.

injected herself with insulin as part of a voluntary attempt to end her own life. As such, B.F. asks this Court to dismiss the appeal and confirm the order for a new trial (R.F., at paras. 94 and 97).

[30] In light of these positions, the sole issue on the Crown's appeal is whether the trial judge made a reviewable error in instructing the jury on the attempted murder of I.F.

B. *B.F.'s Appeal*

[31] B.F. also appeals, seeking to have this Court set aside her convictions for the attempted murder and aggravated assault of E. and order a new trial (A.F., at para. 82). She argues that the trial judge committed three errors in instructing the jury on these offences. First, she submits that the trial judge erred by failing to instruct the jury on the reasonable verdicts available should they accept the alternate theory advanced by the defence, namely, that I.F. acted independently in injecting E., B.F., and herself with insulin (paras. 52-53). Second, B.F. contends that the trial judge erred by failing to explain the requisite *mens rea* and *actus reus* for the offences against E., given the defence's alternate theory that I.F. injected E. with insulin (paras. 55-59). Lastly, B.F. argues that the instructions misled the jury by suggesting that B.F. had, in fact, procured the insulin pens from her place of employment, when this point was both disputed and unsupported by the evidence (para. 65). Other issues, presented in B.F.'s written submissions but not advanced at the hearing (B.F.'s Condensed Book, at p. 61), were meritless and are not considered in these reasons.

[32] The Crown responds that, when the jury instructions are considered in their entirety, the trial judge sufficiently conveyed the essential elements of attempted murder and the findings necessary to establish B.F.'s guilt (R.F., at para. 37). It submits that the instructions addressed the possibility that I.F. injected E., and properly explained that the jury had to be convinced beyond a reasonable doubt of B.F.'s specific intent to kill E. when she administered the insulin (paras. 40 and 43). Lastly, the Crown argues that the trial judge properly summarized the relevant evidence concerning B.F.'s access to the insulin pens, and only later accepted that this fact had been established for the purpose of sentencing (paras. 48-49).

[33] Given these positions, B.F.'s appeal raises the issue of whether the trial judge made a reviewable error in instructing the jury on the attempted murder and aggravated assault of E. This requires the Court to consider the following three sub-issues:

1. Did the trial judge err by failing to instruct the jury on the reasonable verdicts available should they accept the defence theory that I.F. independently administered the insulin to E.?

2. Did the trial judge err by failing to properly instruct the jury on the *mens rea* and *actus reus* of the offences?

3. Did the trial judge mislead the jury in summarizing the evidence surrounding the procurement of the insulin pens?

V. Analysis

A. *Principles Governing the Review of Jury Instructions*

[34] As the jury instructions are central to the issues on these appeals, it is helpful to begin by reiterating some of the key principles governing the review of the instructions in this case.

[35] This Court has consistently directed appellate courts to adopt a functional approach when reviewing instructions for legal error (see *R. v. Abdullahi*, 2023 SCC 19, at para. 34; *R. v. Calnen*, 2019 SCC 6, [2019] 1 S.C.R. 301, at para. 8; see also M. Vauclair, T. Desjardins and P. Lachance, *Traité général de preuve et de procédure pénales 2025* (32nd ed. 2025), at para. 33.35). In each case, the central consideration is whether the substance of the instructions, when read in their entirety and considered in the context of the trial as a whole, properly equipped the jury to decide the case according to the law and the evidence (see *Abdullahi*, at para. 35; *Calnen*, at para. 9; *R. v. Lozada*, 2024 SCC 18, at para. 14; *R. v. Goforth*, 2022 SCC 25, [2022] 1 S.C.R. 715, at paras. 21-22). A properly equipped jury can be understood as one that is both accurately and sufficiently instructed, not perfectly instructed (see *R. v. Jacquard*, [1997] 1 S.C.R. 314, at paras. 2 and 32; *Abdullahi*, at paras. 35, 37 and 58).

[36] To determine if an instruction was accurate, an appellate court must ask whether the jury had an accurate understanding of the law (see *Abdullahi*, at paras. 40 and 43). This inquiry is approached from the perspective of the jury's "overall

understanding of a given issue" (para. 39). An instruction may be inaccurate, and thus amount to an error of law, where there is an "ambiguous or problematic statement in one part of the charge", but not necessarily (para. 41). Accurate statements elsewhere in the charge may compensate for the problematic statements and assure the appellate court that the jury had an accurate understanding of the relevant legal issue.

[37] To determine if an instruction was sufficient, an appellate court must consider whether the instruction was required, and, if so, whether it was provided in sufficient detail for the jury to undertake its task (*Abdullahi*, at paras. 46 and 72). There are both mandatory and contingent instructions. Mandatory instructions are those that must be addressed in every case, regardless of the circumstances. They include, for instance, "an explanation of the charges faced by the accused, including the required elements of each offence to be left with the jury; an explanation of the theories of each side; a review of the evidence relating to the law; [and] the possible verdicts open to the jury" (para. 48). Conversely, contingent instructions are determined by the circumstances of the case. For example, a jury must be instructed on defences and included offences if and only if they bear an air of reality on the evidence (see *R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3, at para. 50; *R. v. Pan*, 2025 SCC 12, at para. 50; see also E. G. Ewaschuk, *Criminal Pleadings & Practice in Canada* (3rd ed. (loose-leaf)), at § 17:112). Whenever a particular instruction is required, regardless of whether the instruction is mandatory or contingent, it will necessarily be an error of law to omit it (*Abdullahi*, at paras. 48-49 and 72).

[38] Both the accuracy and sufficiency of the instructions must be considered in the context of the circumstances of the trial as a whole (*Abdullahi*, at paras. 57-58). The non-exhaustive list of considerations includes the evidence, the closing arguments of counsel, and the silence of counsel (para. 59). The evidence "informs *what* the jury needs to understand in order to be equipped properly to decide the case" (para. 60 (emphasis in original)). Closing arguments of counsel may fill gaps in the judge's review of the evidence, while the silence of counsel may suggest that an instruction was provided in sufficient detail for the jury to undertake its task (paras. 64 and 68). Moreover, both the closing arguments or silence of counsel may inform whether a contingent instruction was required (paras. 63 and 68). Ultimately, the jury instructions will take their colour from this context. However, this context cannot be used to *replace* the trial judge's duty to instruct the jury accurately and sufficiently (para. 58). Appellate review must remain focused on "determining whether the overall effect of the charge achieved its function" (para. 72; see also Ewaschuk, at § 17:112; Vauclair, Desjardins and Lachance, at para. 33.36).

[39] With these principles in mind, I now turn to the Crown's appeal.

B. *The Crown's Appeal*

[40] The parties to this appeal disagree on the legal relationship between attempted murder, under s. 239 of the *Criminal Code*, and counselling or aiding suicide, under s. 241 of the *Criminal Code*. Specifically, they differ as to whether an accused can be found guilty of attempted murder where they provide a person with lethal tools

and that person uses those tools in a voluntary attempt to end their own life. The Crown says that this can be attempted murder where the other elements of this offence are made out on the facts (A.F., at paras. 91 and 99). Conversely, B.F. suggests that this could never amount to attempted murder, but only counselling or aiding suicide under s. 241 of the *Criminal Code* (R.F., at para. 93).

[41] I decline to conclusively resolve this abstract legal issue in this appeal. As I will explain, on this record there was no air of reality to the theory that B.F. aided I.F. in self-administering the insulin with the intent to end her own life. The trial judge was therefore right not to address this theory in his instructions. Adopting the functional approach to the review of jury instructions, the jury was properly equipped to decide B.F.'s guilt on the attempted murder of I.F.

(1) The Jury Did Not Have To Decide Whether B.F. Was Guilty of Aiding Suicide

[42] At the outset, it is important to clarify that the offence of counselling or aiding suicide was not before the trial court. B.F. was not charged with counselling or aiding suicide. Further, both parties submit that counselling or aiding suicide was not an included offence to the attempted murder charges at issue (transcript, at pp. 38-39; A.F., at para. 107; R.F., at para. 42). I agree.

[43] Included offences provide an alternative basis for a finding of guilt (see *R. v. Wolfe*, 2024 SCC 34, at para. 50). An accused may be acquitted of the charged

offence, but nonetheless convicted of a lesser included offence, even when there is no explicit reference to the latter in the indictment (see *Pan*, at para. 49). Included offences are those that are defined as such in the *Criminal Code*, as well as those whose elements necessarily "form part of the offence charged, whether 'as described in the enactment creating it or as charged in the count' itself" (para. 49, citing *R. v. G.R.*, 2005 SCC 45, [2005] 2 S.C.R. 371, at paras. 25 and 29-33; *Criminal Code*, s. 662). If the charged offence as particularized in the indictment could have been committed without committing another offence, that other offence is not included (see *G.R.*, at paras. 31-32; Vauclair, Desjardins and Lachance, at paras. 34.51-34.52; S. Penney, V. Rondinelli and J. Stribopoulos, *Criminal Procedure in Canada* (3rd ed. 2022), at ¶11.21).

[44] The *Criminal Code* does not explicitly provide that counselling or aiding suicide is an offence included in that of attempted murder (s. 662). Further, the elements of counselling or aiding suicide cannot be said to necessarily form part of the attempted murder offences as charged. B.F. is charged that, by administering a noxious substance, she attempted to murder I.F. A person can attempt to murder someone by administering a noxious substance in factual circumstances where they would not also be committing the offence of counselling or aiding suicide. For example, administering a lethal poison to a person who is not attempting to die by suicide would clearly not be counselling or aiding that person to die by suicide.

[45] The conclusion that counselling or aiding suicide is not a lesser included offence to the attempted murder charges is further reinforced by appellate court

jurisprudence confirming this offence is not included in that of murder (see, e.g., *R. v. Gagnon* (1993), 84 C.C.C. (3d) 143 (Que. C.A.), at pp. 158-60; *Mailhot v. R.*, 2012 QCCA 964, at paras. 84-85, rev'd on other grounds 2013 SCC 17, [2013] 2 S.C.R. 96).

[46] Since B.F. was not charged with counselling or aiding suicide under s. 241 of the *Criminal Code* and it is not included in the offence of attempted murder in this case, the jury did not need to consider whether B.F. was guilty of this offence. With this said, I agree with the Court of Appeal that this does not provide a complete answer to this appeal (para. 51). Rather, the central issue on appeal concerns whether the trial judge erred in his instructions for the attempted murder of I.F.

(2) A Jury Should Not Be Instructed on a Suicide Attempt Precluding Liability for Attempted Murder Where the Suicide Attempt Has No Air of Reality

[47] B.F. says that, even though aiding suicide was not charged and is not a lesser included offence, the trial judge should have addressed the effect of an attempted suicide on her liability for attempted murder in his jury instructions. B.F. argues that if the jury found that I.F. voluntarily injected herself with insulin, B.F. could not be convicted of attempted murder because I.F.'s death would have been a suicide rather than a homicide (R.F., at paras. 92-94). Yet, the trial judge instructed the jury that B.F. could be convicted of attempted murder even if I.F. self-administered the insulin. B.F. says that, in the circumstances, it was incumbent on the trial judge to tell the jury to consider whether this amounted to a suicide attempt rather than attempted murder.

[48] I express no view on whether B.F.'s understanding of the law is correct. In particular, I offer no opinion on whether someone voluntarily attempting to end their own life precludes all liability for attempted murder in respect of that attempt. However, even if B.F. were correct on this point, I conclude that it is only where the theory that the victim attempted suicide has an air of reality that the jury would need to be instructed that a person charged with attempted murder could be not guilty by reason of that suicide attempt.

[49] As outlined above, trial judges must instruct the jury on each required element of the offences charged in every case, regardless of the circumstances (see *Abdullahi*, at para. 48). However, trial judges must only instruct the jury on defences and included offences where they have an air of reality (para. 49). Broadly, asking whether there is an air of reality involves a contextual assessment as to "whether the necessary factual inferences are available on a reasonable view of the evidence" (*Pan*, at para. 52). As Doherty J.A. put it in *R. v. Ali*, 2021 ONCA 362, 156 O.R. (3d) 81, "any defence theory realistically available on the totality of the evidence should be left with the jury" (para. 74 (emphasis added); see also Ewaschuk, § 17:112; Vauclair, Desjardins and Lachance, at para. 33.22; *Pan*, at para. 44).

[50] The air of reality threshold serves as an important screening mechanism, ensuring that theories with no real evidentiary foundation are withheld from the jury. Instructing the jury on such theories would only serve to "cause confusion, invite improper compromise, and needlessly lengthen the judge's charge" (*Pan*, at para. 42,

citing *R. v. Park*, [1995] 2 S.C.R. 836, at para. 11; *R. v. Osolin*, [1993] 4 S.C.R. 595, at p. 683).

[51] Confusion would result, for example, if trial judges were required to instruct the jury on self-defence in every murder case, even where the accused cannot point to any evidentiary foundation. Though self-defence would, in theory, always defeat responsibility for murder where its elements are established, the jury need not find that the Crown has disproved self-defence beyond a reasonable doubt where it has no air of reality. This proposition is helpfully illustrated in *Cinous*. There, the accused, who was convicted of second degree murder, successfully appealed on the ground that the trial judge had erred in his instructions to the jury on self-defence. This Court then restored his conviction, holding that this defence lacked an air of reality on the record and should have never been put to the jury (paras. 125-26).

[52] Analogously, to the extent that the Court of Appeal and B.F. are correct in saying that an accused is not guilty of attempted murder where a victim voluntarily self-administers with the intent to end their own life, this theory must be supported by an evidentiary foundation.

[53] Confirming that an air of reality would be required is important in order to address the Crown's legitimate practical concerns with B.F.'s proposed approach (A.F., at paras. 79-81). It may be difficult in a given case to prove the specific intent of the *victim* of a murder attempt, especially where the victim is a child, has no memory of the events, or ultimately dies. An accused must not be allowed to escape criminal

liability by baldly asserting the victim intended to bring about their own death. B.F. says that applying ordinary screening mechanisms like the air of reality test can be relied on "to prevent unwarranted acquittals on this unusual basis" (R.F., at para. 68). I agree.

[54] In summary, even if I were to accept B.F.'s submission that I.F.'s voluntary suicide attempt would be relevant to B.F.'s liability for attempted murder, the trial judge would only need to instruct the jury on that theory if it had an air of reality on the record.

(3) There Is No Air of Reality to the Theory That B.F. Was Aiding I.F. in a Suicide Attempt

[55] I agree with the Crown that there is no air of reality to the theory that I.F. voluntarily injected herself with insulin with the intent to end her life. The trial judge appropriately refrained from addressing this theory when instructing the jury.

[56] Determining whether there is an air of reality on a given record is an exercise guided by principles that have been long settled in our jurisprudence. A trial judge must consider the totality of the evidence (*Cinous*, at para. 53). Where, as here, the inquiry into an air of reality involves circumstantial evidence, a "limited weighing" of the evidence is required (*Pan*, at paras. 64-65; see also *Cinous*, at para. 90, citing *R. v. Arcuri*, 2001 SCC 54, [2001] 2 S.C.R. 828, at para. 23). Importantly, the weighing of the evidence is limited in that it only involves identifying the array of factual

inferences "that could reasonably be drawn", rather than identifying inferences that are more plausible than others (*Pan*, at paras. 64-65, citing *Cinous*, at para. 91).

[57] This means that the exercise is not one of identifying an inference that seems, to the judge, more plausible than others, and then rejecting the less plausible inferences as unreasonable (see *Pan*, at paras. 64-65, citing *Cinous*, at paras. 90-91, and Vauclair, Desjardins and Lachance, at para. 33.23), a point on which all agree (Karakatsanis and Moreau JJ.'s reasons, at para. 111). But neither is it an unstructured exercise in what the judge thinks is common sense or viable in the abstract. It is not enough to focus on whether there is some evidence that could raise an inference. The judge must go on to ask whether the evidence is sufficient such that a properly instructed jury could reasonably arrive at the relevant conclusion (see *Pan*, at para. 52; *Cinous*, at para. 82; see also Vauclair, Desjardins and Lachance, at para. 33.23). Only when there is a complete picture of the array of factual inferences that could reasonably be drawn by a jury can the air of reality analysis be meaningfully undertaken. Otherwise, any assessment under the air of reality test risks becoming speculative and detached from the governing legal threshold.

[58] When conducting a limited weighing of the evidence, it is not permissible to assess the credibility or reliability of the evidence, beyond rejecting bare assertions (see *Pan*, at para. 66; *Cinous*, at para. 90). The evidence must also be understood in light of other circumstances at trial. This includes the positions of the parties, particularly the theories advanced and any concessions made, as well as the live issues

raised (see *Pan*, at paras. 69-70; *R. v. Chalmers*, 2009 ONCA 268, 243 C.C.C. (3d) 338, at paras. 52-53).

[59] In support of the alternate theory that I.F. could have injected herself with the intention to end her own life, B.F. directs this Court to consider three pieces of circumstantial evidence (transcript, at pp. 69-70). Specifically, B.F. submits that there was no evidence of a struggle between B.F. and I.F. in the apartment on the night in question. B.F. also points to evidence that she could not physically overpower I.F., as well as evidence that the handwritten letter that the Crown suggested was a suicide note was co-authored by both B.F. and I.F.

[60] However, the circumstantial evidence relied on by B.F. must be assessed against the totality of the evidence. It cannot be considered in isolation. B.F. points to the absence of any signs of a struggle and evidence that she lacked the capacity to physically overpower I.F. However, all agree that suggesting a person may have self-administered does not on its own establish suicidal intention in every case (see Karakatsanis and Moreau JJ.'s reasons, at para. 109). Evidence about the circumstances surrounding the purported self-administration informs whether there is an air of reality to a suicide attempt. A person may, for example, self-administer without knowing that this would result in their death. This is illustrated by scenarios in which death resulted from the voluntary recreational consumption of drugs or alcohol by the deceased (see, e.g., *R. v. Fournier*, 2023 ONCA 435; *R. v. Haas*, 2016 MBCA 42, 326 Man. R. (2d) 302; *R. v. C.W.* (2006), 209 O.A.C. 1; *R. v. Jordan* (1991), 4 B.C.A.C. 121). In these

scenarios, it does not follow from self-administration that the person intended to bring about their death. Similarly, when a person self-administers a potentially lethal dose of a medication, it will not always be reasonable to infer that they intended to bring about their death, particularly where they lack medical training and are unfamiliar with the medication and the potential consequences of self-administration. For example, in this case, I.F. testified that she had never seen insulin pens in her apartment before (A.R., vol. V, at pp. 333 and 358; see also A.R., vol. I, at p. 120). Unlike B.F., who had medical training and experience administering insulin (A.R., vol. V, at p. 195), there was no evidence suggesting I.F. would have known how to administer the dose of insulin or the consequences of doing so.

[61] Therefore, in considering the surrounding circumstances, even if there were a reasonable inference that I.F. self-administered insulin, this would be insufficient on its own to establish a reasonable inference that I.F. also intended to die. The key question is instead whether the conclusions that I.F. self-administered the insulin *and* did so voluntarily, intending to end her own life, are both available on the same reasonable view of the evidence as a whole. It is necessary to consider the record in this particular case to determine if both conclusions are available to a properly instructed jury (see *Pan*, at paras. 64-65).

[62] There is no testimony from I.F. or anyone else that suggests she intended to end her own life. I.F. testified that her last memory that evening was her lying in bed with B.F. and E. (A.R., vol. V, at pp. 313-14). Her next memory was her release from

the hospital, nearly one week later (p. 314). I.F. testified that before losing consciousness, she did not see any insulin pens or syringes in the apartment (pp. 333, 347 and 358). Nor did she see the identification cards or the handwritten letter placed together on the television stand in the living room (p. 310). I.F. also testified that she was not upset over the family law proceedings, and denied injecting herself with insulin (pp. 333-34 and 358). While I.F.'s evidence as to her lack of familiarity with insulin (see pp. 333 and 358 and also A.R., vol. I, at p. 120) can certainly support an inference that she was not injected for a legitimate medical reason, this is not the same as saying she injected herself with the intention to die, which is the inference at issue here. In the circumstances of this case, it would be unreasonable for a jury to infer I.F. had suicidal intent just because she did not regularly use insulin.

[63] The evidence of the handwritten letter is also insufficient on its own to raise an air of reality. At trial, the Crown suggested that this letter was B.F.'s suicide note (A.R., vol. I, at pp. 100-101 and 126-27). The Crown pointed out that the letter is largely written in the past tense, with certain excerpts implying that B.F. would kill herself along with I.F. and E. (A.R., vol. V, at pp. 260-61 and 263-67; A.R., vol. VI, at pp. 166-67). The letter states in part:

> [The family court judge] made a decision to destroy my child, the same child I carried in my stomach for 9 months, for whom I spent 15 hours and 45 minutes in labour . . . .
>
> I spent 8 years of my life as a surgical nurse working 12 hours shifts, working nights as I wanted to help people. This is how Canada rewards me for wanting to save my child from abduction and harm. . . .

> Please advise [the lawyers and social workers involved] that they achieved their goal. There will be no witnesses left to uncover the dirt that they do through Children's Aid Society. Now they can be at peace. [The family court judge] can decide the faith of her own children, but not of mine.
>
> . . .
>
> Sincerely, [B.F.], mother of [E.] [Emphasis added.]
>
> (A.R., vol. II, at pp. 152-53)

[64] The letter is signed only by B.F. At trial, both B.F. and I.F. testified that B.F. wrote the letter, though I.F., according to her testimony, dictated its contents by reading out a draft she had written (A.R., vol. V, at pp. 219-20, 256, 325-29 and 356). B.F. explained that she wrote the letter to vent to the Prime Minister in response to past correspondence relating to the family law proceedings, and not as a suicide note (pp. 218-20 and 255-56; see also A.R., vol. VI, at p. 149). I.F. also testified that B.F. did not write a suicide note, and denied lying to protect her daughter (A.R., vol. V, at pp. 358-59). No one suggested that the letter reflected suicidal intent on the part of I.F. There is agreement that saying this letter evidences I.F.'s suicidal intent would be speculative (Karakatsanis and Moreau JJ.'s reasons, at para. 112).

[65] Taking the evidence relied on by B.F. at its most favourable, there is no air of reality to the theory that I.F. had suicidal intent. In order to reasonably conclude that I.F. voluntarily attempted suicide on this record, the jury would not only need to accept that I.F. self-administered the insulin, but also conclude that the letter was a suicide note, and that it expressed *I.F.'s* suicidal intention. In this regard, the jury would need

to infer that B.F. accurately conveyed what I.F. dictated to her when writing the letter, and that it reflected I.F.'s views even though it was signed only by B.F., was written largely in past tense, and contained language implying that B.F. was going to kill herself along with I.F. and E. This chain of inference is not reasonably open to a trier of fact on this record because it is tenuous and speculative. Principles that have been long settled in our jurisprudence require that we not ground an air of reality on such inferences (see, e.g., *R. v. Kelsie*, 2019 SCC 17, [2019] 2 S.C.R. 101, at para. 2). When this letter is considered alongside the remainder of the evidence and the record is read as a whole, there is simply no "viable" theory available on the evidence that B.F. was aiding I.F. in a suicide attempt (*Pan*, at para. 44).

[66] The above assessment of the totality of the evidence is further supported by the circumstances at trial. It is true that the Crown cross-examined I.F. on whether B.F. instructed her to inject herself, and on whether she was very upset on the night in question, suggestions that she denied (see A.R., vol. V, at pp. 358-60). And it is true the Crown addressed an alternative theory that B.F. was a party to the attempted murder of E., in which I.F. also participated before being injected with insulin by B.F. (A.R., vol. VI, at pp. 171 and 177; see also A.R., vol. I, at pp. 97 and 101). But B.F. correctly acknowledges that, ultimately, neither party advanced the theory at trial that B.F. and I.F. had each injected themselves with insulin with the intent to end their own lives (R.F., at paras. 13 and 94). The theory that I.F. "injected herself with insulin, provided by B.F., intending to end her own life" was "advanced by neither side" (para. 13 (emphasis in original)). The Crown's submission to the jury was that B.F. "was the

only one with the means, the opportunity and the motive" to commit the crimes against I.F. and E. (A.R., vol. I, at p. 126; see A.R., vol. VI, at pp. 162 and 170) and that "[s]he injected her mother" (A.R., vol. VI, at p. 162). The defence theories, meanwhile, were that all three individuals had been injected by A.N. or, alternatively, by I.F. It was the trial judge who raised the legal relationship between attempted murder and aiding suicide during the pre-charge conference, though he ultimately decided to charge the jury only on attempted murder (pp. 87-97 and 250-55).

[67] I add that, even if the Crown's questions on cross-examination or alternative theories discussed at trial were read to support a theory in which I.F. wished to die by suicide, this alone could not ground an air of reality. The analysis is centred on whether the relevant factual conclusions are available on a reasonable view *of the evidence* (see *Pan*, at para. 52). As the trial judge correctly told the jury in his instructions, questions asked and submissions made by counsel during the trial are not evidence (see A.R., vol. I, at p. 73). The positions of the parties may be relevant context, in particular where the accused makes concessions or chooses not to lead a defence at trial, as this may confirm that the defence has no air of reality (see *Chalmers*, at paras. 52-53; *R. v. Chacon-Perez*, 2022 ONCA 3, 159 O.R. (3d) 481, at para. 167, both cited in *Pan*, at paras. 69-70; see also *Lefebvre v. R.*, 2021 QCCA 1548, at paras. 30-34; *R. v. Williams*, 2025 ONCA 467, 450 C.C.C. (3d) 336, at paras. 16 and 46; Vauclair, Desjardins and Lachance, at para. 33.26; Ewaschuk, at § 17:123). But this should not be misunderstood to mean that statements made by Crown counsel at trial can give an air of reality to a theory that is not reasonably available on the evidence.

[68] To summarize, there was no air of reality to the theory that B.F. aided I.F. in self-administering the insulin with the intent to end her own life. The trial judge was therefore correct not to put this theory to the jury. Instructing the jury on this theory would have only added unnecessary complexity and caused possible confusion.

[69] Instead, the trial judge's instructions provided the jury with everything required to decide whether B.F. was guilty of the attempted murder of I.F. on the record. Attempted murder requires the Crown to prove that the accused took some steps towards the commission of the offence beyond mere acts of preparation and that they had a specific intention to kill (see *R. v. Ancio*, [1984] 1 S.C.R. 225, at pp. 247 and 250-51), regardless of whether actually committing murder was possible in the circumstances (see, generally, *Criminal Code*, s. 24; *United States of America v. Dynar*, [1997] 2 S.C.R. 462, at para. 67; *R. v. Carson*, 2018 SCC 12, [2018] 1 S.C.R. 269, at para. 29; *R. v. Boone*, 2019 ONCA 652, 56 C.R. (7th) 432, at para. 114). The trial judge clearly directed the jury to consider the specific actions of B.F., beyond those that were merely preparatory, to determine if they would establish the *actus reus* of this offence (A.R., vol. I, at pp. 93 and 105). Specifically, the jury needed to be satisfied that B.F. undertook the concrete steps to cause the death of I.F. by administering the insulin (pp. 93 and 106). The trial judge then directed the jury to consider whether the Crown had proved beyond a reasonable doubt that B.F. had the specific intent to kill I.F. when she administered the insulin to I.F. (A.R., vol. I, at pp. 108-9).

[70] In conclusion, the Court of Appeal erred in disturbing B.F.'s conviction for the attempted murder of I.F. on this ground. I will now turn to B.F.'s appeal on the convictions for the attempted murder and aggravated assault of E.

C. *B.F.'s Appeal*

[71] B.F. alleges that the trial judge erred in instructing the jury on the charges of attempted murder and aggravated assault of E. In my view, there is no merit to this argument. The trial judge properly equipped the jury to decide B.F.'s guilt on these offences (see *Abdullahi*, at para. 35; *Calnen*, at para. 9).

(1) The Trial Judge Accurately Instructed the Jury on the Available Verdicts in Light of the Defence Theory

[72] At trial, B.F. proposed a scenario where I.F. acted independently in injecting E., B.F., and herself with insulin (A.R., vol. I, at p. 125). B.F. argues that the trial judge erred by failing to instruct the jury on the available verdicts should it accept this theory. Specifically, she argues that I.F. acting independently of B.F. would preclude B.F.'s liability as both a principal and party to the offences, resulting in a verdict of not guilty (A.F., at paras. 52-53). I am of the view that the trial judge did not err on this point.

[73] At the outset of the charge, the trial judge instructed the jury on motive, third party suspects, and party liability under s. 21 of the *Criminal Code*, including the

relationship between these concepts. The instructions directly addressed the possibility that I.F. acted as a principal, and reviewed the evidence that connected I.F. to the offences (A.R., vol. I, at pp. 78 and 81-83). Importantly, the trial judge was explicit that, in considering whether a third party committed the crimes, including I.F., the Crown's burden of proof did not change. The jury was told to return a verdict of not guilty if it was left with a reasonable doubt regarding B.F.'s guilt when considering the evidence relevant to the scenario in which I.F. was the principal, along with all of the other evidence (p. 81).

[74] The trial judge then instructed the jury on the alternative ways the Crown could establish B.F.'s guilt beyond a reasonable doubt, should it accept that I.F. was the one to inject E. with insulin. Specifically, the jury could still find B.F. guilty for the offences charged if the Crown proved beyond a reasonable doubt that she committed the crimes as a joint principal, as an aider, or as an abettor (A.R., vol. I, at pp. 88-89). The instructions appropriately summarized these pathways for the specific scenario where it was I.F., not B.F., who injected the insulin (at p. 83):

> If, after considering [the instructions on party liability] and all of the evidence, you conclude that [I.F.] may have injected one or more of the three occupants of the room with insulin that evening, that conclusion would not absolve [B.F.] if you also found that [B.F.] intentionally assisted, participated or abetted [I.F.] in committ[ing] the crimes with the necessary intent to kill. [Emphasis added.]

[75] The trial judge revisited the possibility that someone other than B.F. had committed the crimes when instructing on the essential elements of the attempted

murder of E. (A.R., vol. I, at p. 97). The *actus reus* of attempted murder required the jury to find that B.F. administered a noxious substance to E. The trial judge specified that to satisfy this element in the scenario where I.F., and not B.F., had injected E., the jury *also* had to find that B.F. either: (1) aided I.F. by intentionally taking concrete steps to assist her, or (2) abetted I.F. by procuring the insulin pens, instructing her on their use, and encouraging her to inject E. with a potentially fatal dose of insulin (at p. 101):

> It makes no difference to your decision if you find that the Crown has proved beyond a reasonable doubt that [B.F.] herself injected [E.] with the insulin or if you are satisfied that either [I.F.] or [B.F.] injected [E.] with the insulin providing you find that if [I.F.] did so, [B.F.] intended her to do it and intentionally took concrete steps to assist her doing so or abet her by encouraging her to inject [E.] with a potentially lethal dose of insulin and instructing her on the use of the insulin pens she had procured for this purpose. In either case, the Crown will have discharged its burden of proving this first essential element. [Emphasis added.]

[76] The Crown relied on this very action, the injection of insulin into E., to establish the first essential element of aggravated assault, being the intentional application of force (A.R., vol. I, at p. 110). Consequently, in instructing on aggravated assault, the trial judge largely relied on his earlier instructions on the first essential element of the attempted murder of E. The trial judge's instructions on the charge of aggravated assault repeated that the jury may find that B.F. intentionally applied force to E. through one of the four modes of participation (pp. 109-11).

[77] For each offence, the instructions permitted the jury to consider the possibility that I.F.'s action of injecting E. was taken entirely independently of B.F.

The jury was invited to decide whether the evidence supporting that theory raised a reasonable doubt regarding B.F.'s guilt — whether as a principal, joint-principal, aider, or abettor in the commission of the offences. The instructions repeatedly explained that the jury must enter a verdict of not guilty if it did not make the requisite findings under the first essential elements of each count (A.R., vol. I, at pp. 93, 101 and 111).

[78] In conclusion, the jury was properly equipped to consider the theory that I.F., acting independently of B.F., injected E. with insulin and to understand the available verdicts had it accepted that theory.

(2) The Trial Judge Accurately Instructed the Jury on the *Mens Rea* and *Actus Reus* of the Offences

[79] B.F. argues that the trial judge erred in instructing on the *mens rea* and *actus reus* of the attempted murder and aggravated assault of E. Specifically, she states that the trial judge failed to properly instruct the jury on the requirements to establish B.F.'s guilt in a scenario where it was I.F. who injected E. (A.F., at paras. 57-59). I disagree.

[80] As described above, the trial judge's instructions on the *actus reus* for attempted murder properly specified that, if the jury was not convinced beyond a reasonable doubt that B.F. had injected E., it could only find B.F. guilty if it was satisfied that B.F. intended I.F. to inject E. and aided or abetted I.F. in that act (A.R., vol. I, at p. 101). When detailing the *actus reus* for aggravated assault, the trial judge

directed the jury to that instruction and reminded the jury that this element could be established through these different modes of participation (pp. 110-11).

[81] The trial judge properly instructed the jury that the Crown must prove beyond a reasonable doubt that B.F. had the specific intent to kill E. in order to find her guilty of attempted murder (A.R., vol. I, at pp. 102 and 104-5). The instructions also used the phrases "intended to kill" and "meant to kill" to describe the *mens rea* of this offence (pp. 102 and 104-5).

[82] Crucially, the trial judge associated B.F.'s state of mind to her conduct that the jury, had it reached the *mens rea* question in its deliberations, would have already found amounted to administering the noxious substance to E. The trial judge directed the jury to determine whether the Crown had proved beyond a reasonable doubt that B.F. specifically intended to kill E. when she undertook those actions (A.R., vol. I, at p. 102). As described above, in the scenario where I.F. and not B.F. had injected E., those actions would include B.F. either aiding I.F. by intentionally taking concrete steps to assist her, or abetting I.F. by procuring the insulin pens, instructing her on how to use them, and encouraging her to inject E. with a potentially fatal dose of insulin (p. 101).

[83] In considering B.F.'s state of mind, the trial judge directed the jury to consider all of the evidence, while also fairly reviewing some of the evidence that he saw as relevant to this essential element (A.R., vol. I, at p. 102). The trial judge told the jury that, on a review of this evidence, it needed to be satisfied that B.F. had the specific

intention to kill E. when she administered the noxious substance — either acting by herself, or as a joint principal, aider, or abettor — in order to return a verdict of guilt on the count of the attempted murder of E. (p. 105).

[84] In conclusion, the trial judge properly instructed the jury on the *mens rea* and *actus reus* required for the offences. The jury was fully equipped to determine whether the essential elements of the offences were made out, including in a scenario in which it was I.F. and not B.F. who actually injected E. with insulin.

(3) The Trial Judge Adequately Summarized the Evidence Concerning the Procurement of the Insulin Pens

[85] B.F. contends that the trial judge's instructions erroneously implied it was an established fact that she had procured the insulin pens from her workplace, despite the evidence presented at trial to the contrary (A.F., at para. 65). I disagree.

[86] B.F. points out that, in describing the proceedings below, the Court of Appeal said that it had been "established at trial that [B.F.] obtained the insulin pens from her place of employment, Trillium Health Partners, and that she knew how to administer them" (see A.F., at para. 61, citing C.A. reasons, at para. 11). While the wording of the Court of Appeal could have been more precise, this clearly refers to the fact that, in his sentencing reasons, the trial judge found that B.F. had taken the insulin pens from her workplace (A.R., vol. I, at p. 2).

[87] It was open to the trial judge to make this supplementary finding, which was necessary for sentencing purposes and not inconsistent with the jury's verdict nor with the evidence, in sentencing B.F. (see *Criminal Code*, s. 724(2)(b); *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96, at para. 21).

[88] In suggesting that the evidence does not support the judge's finding, B.F. relies on the testimony of an employee at Trillium Health Partners that the insulin pens could have come from any one of their three hospitals, including the hospital at which she worked (A.R., vol. IV, at pp. 91 and 99). B.F. also refers to the evidence of her manager at the relevant time, who stated that she was not aware of any insulin pens going missing from the unit where they worked together (A.R., vol. V, at p. 101).

[89] However, this evidence does not preclude a finding that B.F. obtained the insulin pens from her workplace. To the contrary, there was overwhelming circumstantial evidence available to ground the trial judge's finding for the purpose of sentencing. The Crown is correct to point out, in particular, the evidence that the insulin pens were stored unlocked and uncounted in a refrigerator at the nurses' station, such that B.F.'s manager would not have necessarily known if any had gone missing from her unit (R.F., at para. 46; see A.R., vol. V, at pp. 81, 101 and 145).

[90] In any event, B.F. has not shown how the jury instructions were impacted by a factual finding drawn by the trial judge only after the jury had rendered its verdicts. Contrary to B.F.'s assertion, the trial judge did not instruct the jury "as if that finding of fact was true" (A.F., at para. 65). The trial judge's instructions specifically

mentioned that B.F.'s manager was unaware of any report of insulin pens going missing from her unit, and that various hospital staff had access to the pens (A.R., vol. I, at p. 98). He also instructed the jury on the defence position that the Crown had not proven beyond a reasonable doubt that the insulin pens came from B.F.'s unit and that she had taken the pens (p. 124).

[91] In summary, B.F. has not pointed to any error in the jury instructions that justifies appellate intervention. The instructions did not assert that B.F. had, in fact, procured the insulin pens from her work. Rather, they adequately summarized the pertinent evidence at trial and rightly invited the jury to draw its own conclusion on the evidence.

VI. Disposition

[92] I would allow the Crown's appeal and restore B.F.'s conviction for the attempted murder of I.F. I would dismiss B.F.'s appeal.

The reasons of Wagner C.J. and Karakatsanis and Moreau JJ. were delivered by

KARAKATSANIS AND MOREAU JJ. —

I. Overview

[93] We agree with our colleague Justice O'Bonsawin's reasons for dismissing B.F.'s appeal from her convictions for the attempted murder and aggravated assault of her infant daughter E. However, we respectfully disagree with our colleague on the Crown appeal. We conclude that this appeal should be dismissed. A new trial is necessary on the charge of attempted murder of B.F.'s mother, I.F., under s. 239 of the *Criminal Code*, R.S.C. 1985, c. C-46.

[94] In our view, an air of reality existed at trial for the inference that B.F. provided I.F. with insulin pens, which I.F. then independently and autonomously administered to herself in a suicide attempt. It is therefore necessary for this Court to determine whether the jury needed instructions on how to apply the elements of attempted murder if it concluded that B.F. aided I.F.'s attempted suicide.

[95] Parliament has deliberately chosen to create separate offences of culpable homicide (including murder) and aiding suicide. These offences carry different sentences and public stigma. Parliament has thus judged that aiding suicide carries lesser moral blameworthiness than culpable homicide offences. To respect Parliament's choice, we hold that where an accused merely provides the victim with the means of death, and the victim autonomously acts to kill themselves, the accused has not performed the *actus reus* for culpable homicide. In these cases, there is insufficient legal causation between the accused's acts and the victim's death to assign the accused the moral blameworthiness of a perpetrator of a homicide. Such an accused

cannot be convicted of any culpable homicide offence, or of an inchoate offence such as attempted murder.

[96] We agree with the Court of Appeal's conclusion that since the jury received no instructions on the legal significance of finding that I.F. autonomously chose to inject herself with insulin, it is reasonably possible that the jury applied the incorrect legal standard in assessing whether B.F. performed the *actus reus* for attempted murder. We would dismiss the Crown's appeal.

II. Analysis

[97] The Crown's appeal requires us to resolve two issues. First, whether there was an air of reality to the theory that I.F. could have independently and autonomously injected herself with the insulin in an attempt to commit suicide. Second, if the answer is yes, then we must determine the distinction between the offences of culpable homicide (and attempted murder) and aiding suicide, and whether the trial judge erred in failing to instruct the jury regarding the distinction between the different offences.

A. *The Air of Reality as to I.F.'s Intention To Self-Inject*

[98] We agree with Justice O'Bonsawin's recitation of the facts and the judicial history. That said, we add that it is important to understand how the question of whether there is an air of reality to the inference that I.F. injected herself with insulin to end her own life came before this Court.

[99] The trial judge, unprompted by counsel, posed questions at the pre-charge conference on whether the Crown's alternative theory of culpability conflated the elements of attempted murder and aiding suicide. He expressed some uncertainty on whether providing a person with the means to kill themselves could constitute murder, or whether this only met the elements of aiding suicide.

[100] The trial judge solicited submissions on the issue from counsel, and subsequent discussions between the trial judge and counsel touched on this issue and other tangentially related matters, such as the availability of a common law suicide pact defence. Ultimately, while we do not have the benefit of any formal reasons on any finding of whether there was an air of reality that I.F. chose to inject herself, it is clear from the trial judge's final instructions to the jury that he decided not to provide any such instruction. He also told counsel that the facts in this case did not make out "counselling suicide" under s. 241 of the *Criminal Code* because, on either theory, B.F. did more than just encourage I.F. to take her own life (A.R., vol. VI, at p. 115). The next day, in going over the charge draft with counsel, he explained that when a person gives another the means to kill themselves, and explains how to accomplish that result, the accused may be guilty of murder, even if the death could be described as a suicide (pp. 251-52).

[101] The trial judge did not, however, indicate on the record whether he thought that providing I.F. with the means to take her own life (i.e., the insulin pens and syringes) could have supported a conviction for aiding suicide under s. 241(1)(b).

[102] Before this Court, the Crown argued, as our colleague would find, that since there is no direct evidence that I.F. specifically intended to attempt suicide, the jury needed no further instructions to properly consider the Crown's alternative pathway to culpability. B.F. submitted that because both parties at trial agreed there was a realistic possibility that I.F. injected herself, there must also be a possibility that I.F. attempted suicide.

[103] With respect for the contrary view, we agree with B.F. The evidence permitted a reasonable inference that I.F. chose to inject herself with insulin that B.F. provided. While this inference did not preclude a conviction for attempted murder, it required further jury instructions. The trial judge was right to raise this issue with counsel at the pre-charge conference. Unfortunately, the trial judge did not follow through on his intuition that I.F.'s choice to inject herself bears on B.F.'s culpability for attempted murder.

(1) The Trial Judge's Duty To Instruct the Jury

[104] A trial judge has a positive duty to instruct the jury on "all relevant questions of law that arise on the evidence", whether or not a party has raised the issue (*R. v. Pickton*, 2010 SCC 32, [2010] 2 S.C.R. 198, at para. 27). This duty arises most commonly in the context of defences — a trial judge must instruct the jury on all defences available to an accused that have an air of reality, even defences that the accused does not rely on (*R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3, at para. 51; *Pappajohn v. The Queen*, [1980] 2 S.C.R. 120, at pp. 126-27).

[105] This duty to instruct also requires the trial judge to explain the legal significance of other matters that have an air of reality (e.g., included offences; see *R v. Pan*, 2025 SCC 12). As Justice O'Bonsawin acknowledges, it is an error of law to omit any instruction the jury needs to properly undertake its task (para. 37).

[106] Here, the trial judge instructed the jury to consider the theory that I.F. had injected herself with insulin:

> The Crown may also discharge its onus with respect to this essential element with proof beyond a reasonable doubt that [B.F.] administered the substance to [I.F.] if she procured the insulin pen or pens and provided them to [I.F.] with the intent that [I.F.] would use them to inject herself. . . . It does not matter if you find that [I.F.] was a willing participant in any or all of the actions undertaken by [B.F.].
>
> (A.R., vol. I, at p. 106)

Later, the trial judge noted that I.F. could have been the one to inject B.F., E. and herself with insulin. He reminded the jury that defence counsel had invited them to consider this theory:

> [I.F.] was in the apartment and denies having done it. She is not trained but she is much heavier than her daughter. She could have injected her daughter, then [E.] and then herself. <u>That is a possibility.</u> [Emphasis added.]
>
> (A.R., vol. I, at p. 125)

The trial judge then reminded the jury of the following Crown submission, which also refers to the possibility that I.F. injected herself:

> The Crown suggested that no witness ever suggested that [I.F.] had overpowered [B.F.] and done this. [B.F.] did not say that. Even if [I.F.] actually injected herself or [E.], and the Crown did not suggest you reach that conclusion, she told you that [B.F.] is still guilty. [Emphasis added.]
>
> (A.R., vol. I, at p. 127)

[107] On a plain reading of these instructions, and as we will explain, it was open for the jury to conclude that I.F. injected herself with insulin with the intent to die. Contrary to the trial judge's instructions, it did matter whether or not I.F. was a "willing participant". The trial judge was obliged to instruct the jury on all the consequences of the Crown's alternative theory that I.F. injected herself with insulin. In our view, this includes the legal impact of a finding that I.F. chose to inject herself on the *actus reus* for attempted murder. This is so despite neither party having explicitly argued to the jury that I.F. intended to inject herself.

(2) The Air of Reality That Required a Jury Instruction in This Case

[108] In the scenario where I.F. injected herself, B.F. would not have applied force without consent (i.e., committed an assault). However, B.F. arguably would still have "administered" a noxious substance (insulin) and therefore committed the *actus reus* for attempted murder — carrying out some action to fulfill one's intent to kill which went beyond mere preparation (*R. v. Ancio*, [1984] 1 S.C.R. 225, at p. 247). This scenario could explain the different verdicts on the attempted murder and aggravated assault of I.F. The jury could have had a reasonable doubt that B.F. physically injected

I.F., but still found that B.F. intended to cause I.F.'s death and took action by ensuring I.F. injected herself with a dangerous amount of insulin.

[109] In this way, the Crown's position reflects the air of reality of an inference that I.F. may have chosen to inject herself. Since it is not controversial that the "necessary factual inferences" (*Pan*, at para. 52) to find that I.F. injected herself are available on a reasonable view of the evidence here, the further inference that I.F. intended to inject herself to end her own life is similarly available. In this case, the Crown advanced a theory of culpability based on the indirect administration of a noxious substance. Specifically, they advanced the possibility that I.F. self-administered a drug that B.F. procured, prepared, and/or instructed on use. In doing so, the Crown engaged the issue of I.F.'s personal autonomy to choose whether to inject herself, and thus commit suicide. The engagement of this issue had an impact on the elements of attempted murder. We are not advancing the view that a finding of self-administration of a noxious substance will be enough on its own to ground an air of reality to suicide in every case. As our colleague notes, a person may, for instance, self-administer a substance without knowing it would cause their death (para. 60). As with any other air of reality issue involving circumstantial evidence, the trier of fact must conduct a limited weighing of all the evidence to assess whether there is a realistic possibility that the person intended to die when they injected themselves with insulin (*Pan*, at paras. 64-65). It will always be necessary to consider the surrounding circumstances to determine if suicidal intent can be reasonably inferred from the self-

administration of a lethal substance. However, it remains that the air of reality test simply requires that the inference be reasonably available on the whole of the evidence.

[110] Our colleague takes the view that the chain of inferences required to conclude that I.F. intended to die is so speculative as to be reasonably unavailable. She states:

> In order to reasonably conclude that I.F. voluntarily attempted suicide on this record, the jury would not only need to accept that I.F. self-administered the insulin, but also conclude that the letter was a suicide note, and that it expressed *I.F.'s* suicidal intention. In this regard, the jury would need to infer that B.F. accurately conveyed what I.F. dictated to her when writing the letter, and that it reflected I.F.'s views even though it was signed only by B.F., was written largely in past tense, and contained language implying that B.F. was going to kill herself along with I.F. and E. This chain of inference is not reasonably open to a trier of fact on this record because it is tenuous and speculative. [Emphasis in original; para. 65.]

[111] We disagree. *Pan* cautioned against such an approach of identifying an inference that seems, to the judge, more plausible than others, and then rejecting the less plausible inferences as unreasonable. It oversteps the limited role of a judge in assessing an air of reality with a low evidentiary threshold and involves the weighing of its substantive merits (*R. v. Pappas*, 2013 SCC 56, [2013] 3 S.C.R. 452, at para. 22). Yet, *Pan* emphasized that the purpose of setting the evidentiary bar low is to ensure that *all* viable theories are presented to the jury. Where, as a matter of common sense, a viable theory is available on the evidence, it must be submitted for the jury's thoughtful consideration in the absence of compelling reasons against doing so (*Pan*, at para. 44; *R. v. Osolin*, [1993] 4 S.C.R. 595, at p. 690).

[112] In our view, considering the totality of the evidence before the jury, one of the factual inferences the jury could have reasonably drawn is that I.F. intended to take her own life (*Pan*, at paras. 64-65). It is true that the defence did not argue at trial that I.F. intended to commit suicide that night or had previously expressed a suicidal ideation. Further, Justice O'Bonsawin is correct that I.F. never testified that she intended to end her own life and that it would be speculative to say that the "handwritten letter" evidences I.F.'s suicidal intent (paras. 61-65). However, we agree with B.F. that the circumstantial evidence in this case grounds an air of reality to the inference that I.F. injected herself intending to commit suicide:

- The apartment where B.F. and I.F. lived bore no signs of a struggle between them. The jury was told that "[I.F.] and [B.F.] were found lying side-by-side on the same bed . . . with a pillow at or under their heads" (A.R., vol. I, at p. 83). While E. had nine injection site marks on her thigh, there were no visible needle marks on either B.F. or I.F. (2024 ONCA 511, 439 C.C.C. (3d) 421, at para. 12).

- I.F. testified that she dictated to B.F. the contents of the handwritten letter found on the TV stand, suggesting that she was the true author of what the Crown characterized as a suicide note. The letter stated in part, "[t]here will be no witnesses left to uncover the dirt that they do through Children's Aid Society. Now they can be at peace" (A.R., vol. II, at p. 152).

- Crown counsel agreed at trial that there was an air of reality to the theory that I.F. injected herself (A.R., vol. VI, at p. 91).

[113] We also highlight that there is no direct evidence that B.F. deceived or coerced I.F. into self-administering insulin. While this is not dispositive, taking a common-sense view of the evidence and accepting the legal maxim that people are generally presumed to intend the consequences of their actions (*R. v. Tatton*, 2015 SCC 33, [2015] 2 S.C.R. 574, at para. 27), it seems at least as likely that I.F. injected herself with insulin intending to die as that she did so without that intent or was deceived or coerced into injecting herself.

[114] We also note that both parties agree there was an air of reality to the defence position at trial that I.F. was the sole perpetrator of the attempted murder of E.: that she injected E., B.F., and then herself. This is important context for assessing what factual inferences the jury could draw from the evidence that underpins both charges. If there is an air of reality to the theory that I.F. intended to kill E., B.F., and then herself in the context of the attempted murder of E., then there must also be an air of reality to the theory that I.F. intended to inject herself to bring about her own death.

[115] Furthermore, it is evident from the verdicts that the jury did consider whether I.F. injected herself with insulin. The jury was specifically instructed that it could only find B.F. guilty of aggravated assault (or the included offence of assault) if it found that B.F. actually injected I.F. (i.e., the application of force without consent).

As the trial judge said in his final instructions, "[g]iving them a bat to hit themselves with is also not an assault" (A.R., vol. VI, at p. 321). The jury acquitted B.F. of aggravated assault of I.F. We can infer from this verdict that the jury had a reasonable doubt about whether B.F. physically injected I.F. And given the Crown's alternative theory, we can also infer that the jury found beyond a reasonable doubt that B.F. "administered" the insulin by procuring it, instructing on how to use the syringe, and/or preparing the dose for I.F. to inject herself. As we will explain below, the following jury instruction was inaccurate: "It does not matter if you find that [I.F.] was a willing participant in any or all of the actions undertaken by [B.F.]" (p. 294).

[116] That I.F. may have chosen to inject herself independent of B.F.'s intent or actions was a realistic possibility that arose from the circumstantial evidence. This scenario directly impacted on the alleged *actus reus* for attempted murder. For that reason, the trial judge was required to instruct the jury, regarding the attempted murder of I.F., on the legal significance of finding that I.F. willingly injected herself.

(3) Procedure for Addressing Future Air of Reality Issues

[117] We emphasize that in a case such as this where the trial judge raises an air of reality question on their own motion, it is best practice to solicit submissions from counsel and provide reasons for decision. Here, submissions and reasons would have addressed the impact of I.F.'s alleged choice to inject herself on the jury instructions for attempted murder. This would have afforded both the Crown and the defence a greater opportunity to marshal the evidence and the law necessary to address the trial

judge's concern. While it may be possible, as the Court of Appeal for Ontario did in *R. v. Suthakaran*, 2024 ONCA 50, 433 C.C.C. (3d) 175, to glean a trial judge's thinking from the pre-charge conference transcript, formal submissions and reasons create a clearer record for appellate review. As the court noted in *Suthakaran*, "[i]n determining this ground of appeal, it is helpful to have an understanding of the trial judge's reasons for leaving the defence of a third party with the jury and for providing the instructions that he did" (para. 21).

[118] We turn now to the main question on appeal.

B. *The Distinction Between Aiding Suicide and Culpable Homicide*

[119] The distinction between the offences of aiding suicide and culpable homicide has been a feature of our criminal law since 1892. This country's first *Criminal Code, 1892*, S.C. 1892, c. 29, set out the offences of culpable homicide (at that time murder and manslaughter; see ss. 218, 220 and 227 to 230), and the offences of attempting suicide and aiding suicide (ss. 237 and 238). This was a departure from the common law, which had considered suicide to be a form of homicide, so that those who aided suicide could also be guilty of murder (see, e.g., W. Blackstone, *Commentaries on the Laws of England* (8th ed. 1769), Book IV, at pp. 35-36 and 188-90). Because suicide itself was not made an offence, those who aided suicide could not be a party to murder. Therefore, a separate offence was required to establish criminal liability for aiding a suicide. Today, while the offence of attempted suicide has been repealed, the distinction between culpable homicide and aiding suicide remains.

[120] Under the current *Criminal Code*, while there are certain exceptions available under Canada's medical assistance in dying (MAID) regime (see s. 241(2) to (7); ss. 241.1 to 241.4), aiding suicide remains an indictable offence punishable by up to 14 years' incarceration. Although both culpable homicide and aiding suicide are serious offences, Parliament has chosen to keep them distinct, with differing elements and levels of moral culpability. Aiding suicide has a lesser, though still serious, maximum punishment than culpable homicide, which is punishable by life imprisonment (ss. 235 and 236).

[121] In some cases, the distinction between these different offences will be obvious. However, where a reasonable inference that can be drawn from the record is that the other person contributed to their own death, and the acts of the accused could be characterized as a contributing cause of death (for example, by providing the means of death), the legal distinction between the two offences must be identified and explained to the jury in order to respect and give effect to the distinction drawn by Parliament.

(1) Elements of Culpable Homicide

[122] There are three culpable homicide offences in the *Criminal Code*: murder (s. 229); manslaughter (s. 234); and infanticide (s. 233).

[123] For all homicide offences, the *actus reus* is "the causing of the death of a human being" (K. Roach, *Criminal Law* (8th ed. 2022), at p. 442; see *Criminal Code*,

s. 222(1) and (5)). Section 222(5) sets out the circumstances where such actions qualify as a *culpable* homicide and therefore an offence under the *Criminal Code*. For example, where an accused causes the death of a victim by way of an unlawful act, that killing constitutes the *actus reus* for culpable homicide.

[124] The *mens rea* for murder requires that the accused intend to kill the victim, or intend to cause the victim bodily harm that they know is likely to cause death and is reckless as to whether death ensues (*Criminal Code*, s. 229(a)). Proof of subjective foresight is required for murder (*R. v. Martineau*, [1990] 2 S.C.R. 633, at pp. 645-46).

[125] B.F. was charged with the attempted murder of I.F. Attempted murder is a form of inchoate culpable homicide. The *mens rea* for attempted murder requires specific intent — the accused must have intended to kill the victim (*Ancio*, at p. 249; Roach, at pp. 153-55). The *actus reus* for attempted murder requires that the accused must have carried out some action to fulfill the intent to cause death which went beyond merely preparatory steps (see *Ancio*, at p. 247; *United States of America v. Dynar*, [1997] 2 S.C.R. 462, at para. 50).

[126] Because the *actus reus* of culpable homicide, in all its different forms, is causing the death of another, causation will be a key issue when assessing *actus reus*. Causation is generally not a contentious issue where an unlawful act is combined with the required *mens rea* for the offence charged (*R. v. Nette*, 2001 SCC 78, [2001] 3 S.C.R. 488, at para. 47). However, where it is less clear what acts caused the death,

causation can be more controversial (G. Williams, "Causation in Homicide", [1957] *Crim. L.R.* 429, at p. 510).

[127] In *Nette*, this Court confirmed that there is one applicable standard of causation for all forms of culpable homicide, which asks whether the actions of the accused were a significant contributing cause of death (para. 71). This standard requires proof of both factual and legal causation. Factual causation is met when the accused's actions are a "[b]ut for" cause of the victim's death (*R. v. Maybin*, 2012 SCC 24, [2012] 2 S.C.R. 30, at para. 15). Legal causation is concerned with concepts of moral responsibility: ". . . the inquiry is directed at the question of whether the accused person should be held criminally responsible for the consequences that occurred" (*Nette*, at para. 45; *Maybin*, at para. 16). This is a separate consideration from *mens rea* (*Nette*, at para. 47).

[128] In some cases, more than one person or factor may contribute to causing death. However, this will not necessarily preclude proving that the accused met the legal causation standard for culpable homicide (*Nette*, at para. 77; *Maybin*, at para. 29). Our law recognizes that an individual need not be the sole cause of death to be guilty of a culpable homicide offence. Therefore, intervening acts will not always break the chain of legal causation and absolve the accused of moral blameworthiness for the death (*Maybin*, at paras. 28-29).

(2) Distinguishing Culpable Homicide From Aiding Suicide

[129] Section 241(1) of the *Criminal Code* sets out three modes of carrying out the offence of "counselling or aiding" suicide: counselling, abetting, and aiding. This Court has not definitively set out the elements of aiding suicide. However, this Court has defined the *actus reus* of the general mode of liability of "aiding" as doing something or omitting to do something to assist or help another to commit an offence. The *mens rea* requires the aider's knowledge that a principal intends to commit an offence, and the aider's intent to assist the principal in so doing (*R. v. Briscoe*, 2010 SCC 13, [2010] 1 S.C.R. 411, at paras. 14-18; see also *Criminal Code*, s. 21(1)(b)). By analogy, providing an individual with the means to commit suicide, with knowledge that the individual intends to commit suicide and intending to help them commit suicide, would appear to establish the offence of aiding suicide.

[130] When an accused has provided a person with the means to take their own life, and that person makes an independent and autonomous choice to take their own life, the question is how to distinguish between the offences of culpable homicide and aiding suicide.

[131] Here, B.F. was not charged with aiding suicide. The trial judge told the jury that it could find that the *actus reus* of attempted murder had been established in one of two ways: either by B.F. actually injecting I.F. with the insulin, or by B.F. simply providing I.F. with the insulin pens with the intent that I.F. would use them to inject herself (A.R., vol. I, at p. 106). In this respect, the trial judge stated that "[i]t does not

matter if you find that [I.F.] was a willing participant in any or all of the actions undertaken by [B.F.]" (p. 106).

[132] The Court of Appeal held that the trial judge erred by failing to distinguish between the *mens rea* and *actus reus* of attempted murder and aiding suicide (see paras. 45-58). Writing for the court, George J.A. held that when an accused provides another individual with the means to commit suicide, knowing they would do so, the key issue is "whether the accused, either through manipulation or intimidation (or by other means), overbore the victim's freewill in choosing suicide" (para. 44). George J.A. concluded the trial judge's failure to explain this distinction to the jury meant that the jury could have found that B.F.'s actions constituted attempted murder, even if those actions instead constituted aiding suicide. The jury charge blurred the line between the two offences. A new trial was required (para. 66).

[133] The Crown submits that there was no error in the jury charge, and that the Court of Appeal erred by modifying the causation test for culpable homicide with the novel requirement that the victim's free will must have been overborne. The Crown says this requirement artificially focuses on the final act in the chain of causation, contrary to this Court's jurisprudence regarding causation in homicide cases (A.F., at paras. 5-6). This, the Crown contends, imposes a "bright line" rule which breaks causation in particular cases, thus lacking the contextual nuance of causation as established by this Court. Instead, the Crown argues that the test for causation set out by this Court's jurisprudence is nuanced and flexible enough to distinguish between

the different offences (A.F., at paras. 69-74 and 100). This position is supported by the intervener Inclusion Canada, who submits that the Crown's approach better protects vulnerable individuals who are living with disabilities.

[134] The difficulty with the Crown's approach is that it subsumes the conduct for aiding suicide within culpable homicide, without distinguishing the offences' different levels of moral blameworthiness. Potential liability is neither clear nor predictable. If the Crown's position is accepted, then there could be cases where an accused is found guilty of culpable homicide because their actions were a significant contributing cause of death, even though they knowingly provided the deceased with the means to carry out an autonomous and independent decision to take their own life — which is itself not a crime.

[135] In our view, such a result does not respect the legal distinction Parliament intended in creating two distinct crimes. It does not identify where or how the legal line is drawn between two offences, which reflect different levels of moral blameworthiness. Moral blameworthiness is a sacrosanct principle of the legal system designed to avoid convicting the morally innocent (*R. v. Bernard*, [1988] 2 S.C.R. 833, at p. 843; *R. v. Brown*, 2022 SCC 18, [2022] 1 S.C.R. 374, at para. 24; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at pp. 513-14). Recognized as a constitutionally protected principle of fundamental justice, the moral blameworthiness requirement "maintain[s] a proportionality between the stigma and punishment attached to a murder conviction and the moral blameworthiness of the offender" (*Martineau*, at p. 646).

Thus, different offences can attract differing levels of moral blameworthiness. This Court has already recognized, for example, that a murder conviction attracts a higher level of stigma and heightened punishment than a manslaughter conviction (*Martineau*, at p. 645; *R. v. Creighton*, [1993] 3 S.C.R. 3). Within this context of differing levels of moral blameworthiness between criminal offences, and to respect Parliament's intention to create two crimes, it is necessary to identify the legal distinction in the elements of the offences of aiding suicide and culpable homicide — here, attempted murder.

[136] This distinction may, sometimes, be reflected in the *mens rea*, such that the accused does not have the specific intent required to establish the *mens rea* for attempted murder. But the difference between any culpable homicide and aiding suicide must also be reflected in the *actus reus*. The legal analysis must identify in what circumstances actions will meet the *actus reus* of culpable homicide, as opposed to aiding suicide. Under both offences, the accused's actions may factually be a contributing cause of the death. The analysis must set out the nature of the accused's actions that moved from aiding suicide to murder, or attempted murder. In our view, the issue arises squarely in the context of legal causation when establishing the *actus reus*.

[137] Legal causation is an assessment of moral blameworthiness and whether the accused should be held criminally responsible for the consequences of their actions, especially when there are other contributing causes of death. In this respect, we agree

with the Crown's position that the law of causation of homicide is sufficiently flexible to respond to circumstances where it is not immediately clear whether the accused's actions constituted homicide or aiding suicide (see A.F., at paras. 74 and 99-100). The law of causation has always been contextual and able to respond to differing levels of moral culpability.

[138] For example, in *R. v. Harbottle*, [1993] 3 S.C.R. 306, this Court held that constructive first degree murder under s. 231(5) of the *Criminal Code*, wherein "death is caused" by an accused "while committing or attempting to commit" certain offences, requires a higher standard of causation due to the gravity of the offence and the severity of the sentence (p. 323; see also *Nette*, at para. 65). For an accused to be guilty under that provision, their actions must be "a substantial and integral cause of the death" (*Harbottle*, at pp. 323-24). Thus, while legal causation focuses on an accused's actions rather than their intentions, it is still focused on whether the accused is sufficiently morally blameworthy to deserve the heightened stigma and punishment of a particular criminal offence.

[139] In addition, legal causation can consider the issue of when an intervening act can break the chain of causation. *Maybin* recognized that courts may assess intervening acts using different methods. For example, the "reasonable foreseeability approach" asks whether the general nature of the intervening act was reasonably foreseeable when the accused committed their actions (para. 26). In turn, the "independent intervening act" approach asks whether the intervening act was an

independent factor which severed the impact of the accused's actions, making the intervening act the sole cause of death, or whether the intervening act was triggered or provoked by the accused's actions (para. 27). This Court was also clear in that decision that both of these approaches are simply analytical aids, and are not necessarily determinative. At all times, the focus of the inquiry remains on whether the accused's actions were a significant contributing cause of death, and therefore whether the accused ought to be held legally responsible for their actions under the charged offence in a normative sense (paras. 28-29).

[140] The Crown's alternative theory in this case was that I.F. injected herself with insulin B.F. provided. On that theory, B.F.'s acts may not be sufficiently morally blameworthy to be convicted of the attempted murder of I.F., but could be sufficiently morally blameworthy to be convicted for aiding her suicide. Thus, addressing legal causation requires a more specific inquiry where the alleged victim sought to commit suicide. It requires an adaptation of the principles from *Maybin*. Questions of reasonable foreseeability or whether an accused's acts trigger independent acts insufficiently respond to the distinction between suicide and homicide. These questions could lead to the conclusion that an individual's suicide was reasonably foreseeable when the accused provided them with the means to die by suicide, or that the suicide was factually triggered by the accused's provision of the means and was not an independent intervening act which severed the chain of causation. But such conclusions would fail to grapple with the normative distinction between killing a person, and assisting a person who decides to end their own life.

[141] Instead, where the deceased took their own life autonomously and of their own free will, this independent choice to act to cause their own death may sever the accused's legal causation. Those circumstances reduce the accused's moral blameworthiness, and do not establish legal causation for culpable homicide. The accused's actions will therefore not be a significant contributing cause of death, and an acquittal for any culpable homicide charge should follow. But depending on the nature and extent of the accused's actions, they may be liable for aiding suicide under s. 241(1) of the *Criminal Code*.

[142] But where the accused's actions somehow actively undermined or overpowered the deceased's autonomous choice whether to commit suicide, then the suicide may no longer qualify as an independent intervening act, and causation for homicide may be established. For example, where the accused manipulates or induces the deceased into taking their own life, such that the deceased's actions can no longer be seen as a fully autonomous and independent choice, the accused's participation in the suicide may rise to the level of culpable homicide. Thus, encouraging a person known to be vulnerable to take their own life, and proactively giving them the means to do so, could potentially make an individual a significant contributing cause of the other person's death.

[143] This is not, as the Crown contends, an entirely new standard of causation (A.F., at paras. 73-75). The same standards and principles of causation, as established in *Smithers v. The Queen*, [1978] 1 S.C.R. 506, *Nette*, and *Harbottle*, continue to apply,

although adapted to unique factual circumstances. Moreover, we would not accept the Crown's argument that this analysis inappropriately re-centres the causation and *actus reus* analysis in homicide cases around the mental state of the victim — something it argues is unprecedented and unworkable in practice (A.F., at paras. 79-81). Such considerations are not new, and are already part of the *actus reus* of other offences in the *Criminal Code*. For example, the *actus reus* of sexual assault is established when the accused touches the complainant in a sexual manner, without the complainant's consent. The absence of consent is determined by "reference to the complainant's subjective internal state of mind towards the touching, at the time it occurred" (*R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at para. 26; see also *R. v. G.F.*, 2021 SCC 20, [2021] 1 S.C.R. 801, at para. 29).

[144] In addition, it is unnecessary to require, as B.F. urges us, that the differentiation between suicide and homicide be resolved at the outset of the analysis, before any assessment of *actus reus* or *mens rea*. While B.F. argues that the distinction between suicide and homicide is clear, and that a suicide simply cannot ground liability for homicide due to its distinction from homicide, we do not accept that the distinction will always be obvious.

[145] This said, we agree with B.F. and the interveners that the key question is whether there was a suicide (or attempt suicide) (see R.F., at paras. 64-65; I.F., Attorney General of Canada, at paras. 2-3; I.F., Canadian Civil Liberties Association, at paras. 2-3). But we view this question as properly being addressed as part of the legal

causation analysis. As the Court of Appeal recognized, this question requires an assessment of whether someone independently and autonomously intended to cause their own death, decided to act on that intention, and carried out the acts that would result in their own death. In such circumstances the *actus reus* of culpable homicide offences must account for the possibility that the accused's acts were simply to aid another's suicide. However, when those acts go beyond "aiding" such that they actively undermine or overbear the independence of another's choice to commit suicide, then the accused may be guilty of culpable homicide. The key consideration is whether the accused's acts contributed to the death in such a way that it is no longer correct to characterize the death as an independent autonomous choice that breaks the chain of causation and absolves the accused of moral blameworthiness.

[146] Finally, we do not accept the Crown's alternative submission, which suggests that once an unlawful act is proven to have been a significant contributing cause of death, then a new partial defence of assisted suicide should be recognized. This defence would ask what steps the accused took to determine whether the deceased's choice to take their own life was independent and autonomous. Should the partial defence be made out, the accused would not be liable for culpable homicide. However, creating a new defence removes the analysis from its appropriate place in homicide cases — legal causation, which assesses the accused's moral culpability.

C. *Application: Instructing on Actus Reus for Attempted Murder*

[147] Here, given the air of reality to the theory of the case that I.F. injected herself with insulin with the intent to commit suicide, the trial judge was wrong to suggest that that I.F.'s willing participation in the injection of insulin would be irrelevant. Once the scenario that I.F. may have willingly and autonomously injected herself with the insulin procured by B.F. was put to the jury, the trial judge had to instruct the jury as to whether I.F.'s *choice* to inject herself with insulin had severed the chain of causation, such that B.F. would no longer have been a significant contributing cause of I.F.'s death.

[148] It was incumbent upon the trial judge to make the distinction between attempted murder and aiding suicide clear to the jury. Otherwise, there was a risk that B.F. would be found guilty of attempted murder, despite her moral blameworthiness not rising to the level of that offence. To maintain the distinction between aiding suicide and attempted murder, the trial judge should have instructed the jury that if it concluded that B.F. performed actions to carry out her intent to kill, namely "administered a noxious substance" by way of I.F. injecting herself with insulin, it should then consider whether I.F.'s choice to inject herself was independent and autonomous, or whether B.F.'s acts undermined or overtook the independence of I.F.'s choice. The jury should have been instructed that if it found that I.F.'s choice was independent and autonomous, then it should acquit B.F. of attempted murder.

[149] Since there existed an air of reality to the theory of the case whereby B.F. aided I.F.'s attempted suicide, it was an error of law for the trial judge not to instruct

the jury on the legal significance of this finding to the *actus reus* analysis of attempted murder (*R. v. Abdullahi*, 2023 SCC 19, at para. 49).

[150] The Crown does not rely on the curative proviso. There must be a new trial on the attempted murder charge regarding I.F.

III. Conclusion

[151] We would dismiss B.F.'s appeal, dismiss the Crown's appeal, and uphold the Court of Appeal's order for a new trial on the charge of attempted murder relating to I.F.

Appeal by His Majesty The King allowed, Wagner C.J. and Karakatsanis and Moreau JJ. dissenting. Appeal by B.F. dismissed.

Solicitor for the appellant/respondent His Majesty The King: Attorney General of Ontario, Crown Law Office — Criminal, Toronto.

Solicitors for the respondent/appellant B.F.: Henein Hutchison Robitaille, Toronto; Lawspec Professional Corporation, Toronto.

Solicitor for the intervener Attorney General of Canada: Department of Justice Canada, National Litigation Sector, Ottawa.

Solicitors for the intervener Canadian Civil Liberties Association: Addario Law Group, Toronto.

Solicitors for the intervener Inclusion Canada: Rodin Law Firm, Calgary.