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Two-for-one sentencing deals symptom of deeper problem



PAUL LACHINE/NEWSART

Clogged justice system's chronic delays require fundamental reform not political posturing

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Damian McBean was convicted of 11 counts, including possession of narcotics for purpose of trafficking, possession of a gun for purposes dangerous to public peace, and escaping lawful custody.

The offences were serious and the trial judge found he deserved three years in jail. However, McBean had not made bail on his arrest and had spent more than a year awaiting trial. The judge counted that pre-trial jail time as equivalent to 26 months. In the end, McBean did not even serve the 10-month balance of his sentence. He was released directly after trial.

As a general principle, judges give special credit for time spent in custody prior to conviction. If an accused spends eight months in jail before trial and gets



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convicted, the court usually counts the eight months as "worth" 16 months of straight jail time.

Of course, prior to trial, those held are deemed to be innocent. Ironically, if that turns out to be true, they get no benefit from the two-for-one deal; it works only for those eventually found guilty.

The justification usually given for the two-for-one credit is that pre-trial custody is spent in circumstances much harsher than regular prison. Holding facilities are often grossly overcrowded; rehabilitation programs are limited or nonexistent; pre-trial jail time doesn't count toward parole; and the entire context of imprisonment before trial is psychologically much harsher than a straight prison sentence.

Certainly some people have abused the credit. Accused who are clearly guilty and know they will get a lengthy sentence have been known to delay trial to increase their two-for-one time. But where such games are obvious, judges have declined to give the special credit. Still, the community's concern is valid. As Liberal justice critic Dominic LeBlanc put it, the special credit "has been abused in many jurisdictions and it's led to a decline in public confidence."

That's right, but the two-for-one credit is not the cause of the problem, it's a symptom.

To meet the public's justified concern, the federal government now plans to end the two-for-one credit. The justice minister has said this will unclog the system by getting rid of incentives to delay.

Unfortunately, the change may have the opposite effect. The proposed legislation is a Band-Aid that doesn't address the real problem. What we need is not more political posturing designed to look tough on crime; we need to address the root problem.

The reason the two-for-one credit is an issue at all is because of the length of time it takes to get to trial. The Ontario Court of Appeal has held that 18 months is an acceptable delay for a Superior Court case — presuming no special issues arise to make an even longer delay acceptable. If trial delays were only a few months, the issue of the two-for-one credit would be trivial. Eight months off a three-year sentence (four months of pre-trial incarceration, times two) hardly compares with 26 months off the same sentence.

Getting to trial used to be speedier. As late as 1965, an Ontario capital murder case, *R v Black*, involved a murder in January, a full jury trial in June and a Court of Appeal decision in November. Less significant cases moved even faster; in



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Toronto, shoplifting cases were sometimes tried the same week. Granted, the accused had fewer rights in the 1960s, and forensic science was less advanced, but the increase in delay still seems excessive.

In fact, most people arrested and held prior to trial are eventually convicted of something and sentenced to some prison time. But meanwhile, they spend months or even years in horrid conditions. Remove the two-for-one credit, and they will move heaven and earth to get released on bail or to have a trial right away. Bail hearings, already protracted, will become more complex. Motions for a speedy trial " or a stay of proceedings because trial is delayed " will become more urgent. But the system is already at the breaking point and trials cannot be moved ahead. The result will be even more congestion and, arguably, more stays of proceedings because of delay.

What can be done about the delay? The easy answer is to recommend appointing more judges and prosecutors and spend more money on legal aid. It is true, particularly in busier urban courts, that a lack of resources makes delays much worse. But adding resources alone would not address the underlying problem. They may be overworked, but we already have plenty of judges, prosecutors and defence lawyers.

What we need to do " and can do " is simplify the criminal system. Early fixed trial dates, for a start, would focus lawyers and police on moving quickly. The preliminary inquiry system " for serious cases, effectively a trial before trial " adds a layer of complexity to other cases for no obvious reason. And our split-level court system " with overlapping jurisdictions for provincial and federally appointed judges " is unnecessary. A single, unified criminal court would, at a stroke, eliminate complexity.

Taking these steps will not be easy. Fixing the system will require political will. But making justice speedy, as it should be, would benefit the accused, their victims and society.

It may be a platitude, but it is true nevertheless, that justice delayed is justice denied. The problem is not the two-for-one credit, but all the delays in the system.

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