

REVIEW

THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER

D A R C Y L . M A C P H E R S O N *

The Corporation: The Pathological Pursuit of Profit and Power, by Joel Bakan
(New York: Free Press, 2004), 228pp.

I must begin this review of Professor Joel Bakan's new book, *The Corporation: The Pathological Pursuit of Profit and Power*—recently made into a film that I have yet to view—with an admission: I am a professor of corporate law as well as a former corporate lawyer. As such, prior to reading the book, I tended to view the idea of a corporation as being “pathological” with skepticism and disdain.

That said, I offer my congratulations to Bakan, for he has performed an exceedingly difficult task. He has written a book that examines a staple of our society—the corporation whose shares are traded on a public forum, such as a stock exchange—and persuasively argues that our conception of it as a good and benevolent part of our social fabric is in need of adjustment. Even those who are intimately familiar with and sympathetic towards the workings of the corporation will, upon reading this book with an open mind, think again about their views. For those of you who are not so familiar, *The Corporation* provides an intriguing introduction.

Bakan begins the book with a review of the historical roots of the private, for-profit corporation in England and its eventual status as an outlaw in the early 18th century. When the corporation was embraced in the U.S., and later in England as well, there was no concept of limiting the liability of shareholders to the amount that the shareholder had invested. This limiting of liability came about in the mid-19th century as a way to encourage the middle class to invest in the corporate enterprise as well as to bolster the legitimacy of capitalism. Bakan's point, as I take it, is to show that the advent of the limited-liability

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corporation was not a result of any natural or inevitable evolution of business but rather was simply the structure that society happened to have chosen for the moment. That series of choices that led society to this point is not irreversible.

He then moves on to one of the book's major premises: the corporation is pathological. It is an institution of modern life, but it is also a person. The law says that a corporation has a personality separate from those who own it and from those who control its operations. This personality is pathological, in that it cares about no one other than itself and its own economic interests. Despite how odd this may sound to those of us who have spent time representing corporations and/or teaching corporate law, Professor Bakan is quite compelling on this issue. Using psychiatric diagnostic expertise, he explains how well the corporation, as currently constructed, fits the mold of pathologically self-interested behaviour, and how unapologetically it does so.

Two important elements are worth noting at this point. First, Bakan does not appear to be particularly concerned about the current series of corporate scandals, even though Enron and other instances of corporate greed and misbehaviour do receive some mention in the book. Rather, the point is a broader one, based in the institutional structure of the corporation itself. Enron and others may be examples of the symptoms, but the disease itself lies elsewhere. It lies engrained, argues Bakan, in the fact that society tells corporations—by an explicit legislative mandate—that their only goal is to make money for their respective owners.

Secondly, this pathology does not extend to the human beings who own or run corporations. Although corporate executives are required to pursue the interests of the corporation to the exclusion of everything else, in other parts of their lives, these human beings can be—and often are—deeply concerned about the well-being of others. Therefore, the people who do the work of the corporation are not, simply by virtue of doing that work, pathological. The corporation, on the other hand, exists only to service itself, in all contexts, regardless of the effect on anyone else. Hence, it is pathological, according to Bakan.

But surely, one might say, there is much corporate philanthropy going on. Does this not show that a corporation is concerned about more than itself? Bakan says no, and is supported in this contention by the chief executive officers of corporations noted for their corporate philanthropy, including Sir John Browne of British Petroleum and Hank McKinnell of Pfizer, Inc. These two CEOs, as well as renowned economist Milton Friedman, state that corporate philanthropy stops at the point that it ceases to benefit the shareholders of the company. Bakan goes on to set out case law (from both sides of the Atlantic) that demonstrates that corporate giving without expectation of positive return for shareholders is simply not part of the current corporate mission. Philanthropy—or anything else, for that matter—is only allowed to the

point that it could bring the corporation positive results, either now or in the future. Doing good simply for the sake of doing good is, for a corporation, blatantly illegal.

Having thus dispensed with the idea of genuine corporate philanthropy, Bakan turns to examining how the corporation treats others when trying to complete its mission. The corporation is concerned about the level of return on its investments. Take the money earned when goods are sold and subtract the cost to the corporation to produce the goods: the remainder is profit. If the corporation can get another entity to bear some of the overall costs (including costs to the environment and to the health of human customers and workers), the better the return on investment is for the corporation. The costs borne by someone else are, in economics parlance, 'externalities'. Bakan argues, using examples drawn from case law regarding the use of sweatshops, product liability and environmental liability, that the process of externalization is problematic. It means that nothing and no one has intrinsic value to a corporation. Everything, including human lives, must be reduced to dollars and cents. If the corporation can get someone—anyone—else to pay for these costs, the costs are external, and thus irrelevant to the corporation's profit-earning motivation. Bakan argues, in essence, that the corporation is saying "Unless I have to pay for it, it is not my concern."

The spotlight is then turned to the relationship between corporations and governments. Bakan argues that through the proliferation of corporate campaign contributions, lobbyists and industry groups designed to protect business interests, corporations have gained a good deal of power in the electoral process. They have the ear of government, and are willing to preach deregulation. Deregulation, as exemplified through an Enron case study, removes barriers to the earning of profit. The problem with this, implies Bakan, is that the costs that are removed from the corporation through deregulation do not disappear but rather are simply shifted to someone else. In other words, these costs become externalities.

Deregulation is not the only issue in the government-corporation relationship. The very language used by both corporate executives and government regulators is problematic, according to Bakan. Both public- and private-sector actors view themselves as being in 'partnership' with one another. Yet, Bakan argues, this idea of partners is to work in each other's mutual interests. Government exists, amongst other reasons, to regulate the conduct of its citizens, including its corporate ones. Partnerships are based, at least in part, on trust. Oversight (the role of government, according to Bakan) is based on knowledge of a set of circumstances, and not on trusting those who are to be overseen. Bakan goes on to provide examples of where governments have reduced the funding of regulatory agencies, thereby making it practically impossible for the agencies to fulfill oversight and enforcement mandates other than by trusting corporations to comply with the law.

American for-profit corporations have also begun to move into areas that, in Canada at least, have traditionally been considered part of the public sphere. Using examples drawn from education and health care, Bakan advances another major premise: corporations have essentially made their presence felt in every conceivable way in our lives. In supposedly 'public' education, corporations provide educational materials that are designed to promote their products. For-profit corporations are also offering alternatives to public education for those who can afford it. Truly public spaces, like streets, are used less often by urban pedestrians because of large underground, air-conditioned alternatives, which are privately owned by corporations and sell promotional space while curtailing the expression of other views.

The presence of corporate messages cannot be avoided in today's world. Some corporations have even gone so far as to create what is referred to as "undercover advertising". In other words, corporations are now manufacturing 'real world' situations, such as paying people to allow empty boxes from a retailer to be left in a residential building so that people may believe that the retailer is wildly popular. This form of advertising does not look like traditional advertising, and is more likely to have an impact on the consumer.

The loosening of constraints on advertising aimed at children in the U.S. has led to a new form of consumer. Although Bakan does not use this term, I would call them 'secondary consumers'. Adults are the primary consumers for most big-ticket items. Yet advertisers have realized that children can help sell their products to parents. Children will often 'nag' their parents to buy certain products (not necessarily meant for consumption by children, like a car) because there is a secondary benefit to the child (like the inclusion of a DVD of a movie aimed at children). Advertising is thus directed to the secondary consumer—the child—in the hope that the secondary consumer will influence the primary consumer—the parent—to purchase the product advertised.

Bakan does not indicate that all these practices are necessarily unethical. Rather, the idea is put forward that commercialization in general may not always be a good thing. Corporations are shrinking the public sphere, the sphere in which we show concern for others. The corporation cannot show concern for others, says Bakan. It makes money. There is nothing wrong with making money. But there may come a point where commercialization goes too far, and members of society collectively need to show concern for something other than profit. This massive commercialization appears to be the road society is on. If this is not the direction in which society wants to go, changes are needed.

If the problems are many and changes are necessary, what does Bakan suggest as alternatives? His ideas fall into four broad categories: (a) improving regulatory controls; (b) strengthening political democracy; (c) creating a robust public sphere; and (d) challenge international neo-liberalism. In other words, Bakan wants to fundamentally re-conceive the relationship between government and corporations. He does not want to rid the world of

corporations. On the contrary, he acknowledges both that corporations are efficient tools for the promotion of economic activity, and that society has gone past the point of being open to changing all corporations into public-purpose corporations. His reform agenda begins with the idea that, corporations being creatures of statute, corporate statutes must be responsive to public policy concerns and have corporations operate in a way that meets the needs of the public in general and not simply those of investors. Corporations do not exist but for the consent and positive enablement of government. The profit-driven corporate mission is set by legislative enactment. If corporations have too much power as compared to governments, governments can change that very easily by passing a law. Corporations can be forced to internalize (that is, pay for) costs that are currently externalities. Governments can also pass laws to limit the ability of corporations to finance candidates and lobby governments.

Governments can control corporations. There is a balance between the corporation, which exemplifies pure, unadulterated self-interest, and government, which is designed to care not for itself, but for the community of those it governs. Bakan says that to assert that human beings are self-interested is correct, but to stop there provides a distorted and dangerously incomplete picture of who we are as creatures capable of caring for others. Therefore, we need to reset the balance between corporations and government, because the current balance does not reflect our basic nature as a society. There are values in society that cannot and should not be sacrificed in the name of profit. The regulatory sphere must be reinvigorated as a necessary and even commendable counterbalance to the singularity of the corporate mission. Bakan refuses to concede that the market has any real power to control corporations, at least not without formal legal sanctions to back up demands for compliance. Government, which is both democratically controlled and has a mandate to serve the public, is better suited as an agent of change in favour of the public interest than are markets, which generally serve those with economic power, or corporations, which, by design, only serve themselves. Government must re-assert itself and ensure that corporate power remains in balance with government and the society being governed.

This book was a genuine experience and journey for me. I began with loathing for what I understood to be its basic premise. But with each passing page, patterns began to emerge. Each chapter was on a discrete topic and could have been relatively self-contained, but instead, the book's chapters built on each other. Once one sees the history of the for-profit corporation as an investment tool for the middle class in a capitalist society, it becomes easy to swallow why the for-profit corporation was given a profit motive. Once one accepts that a corporation's overriding purpose is profit, the idea of the corporation's drive to externalize costs and exert influence over the political process makes perfect sense. If a corporation runs out of ways to make money in the traditional private sector, why not commercialize the traditional public

sector? In other words, the book is a successfully woven tapestry of ideas that hangs together cohesively.

The Corporation is engagingly written, easy to understand, and largely faithful to Bakan's avowed goal of avoiding technical jargon. He also manages to avoid belabouring points and remains concise without losing important details. Bakan's use of interviews with leaders in both the corporate sector and in corporate criticism is very intriguing. It is hard to disagree with the assertion that a corporation is driven solely to profit when leading corporate executives and economists are the people supporting it. Further, the presentation of case law and other research shows that the author's anecdotes are solidly supported by hard data.

Some may accuse this book of pushing an anti-corporate message. In my view, such criticism would be unjustified. In any conversation about the relationship between corporations and government, there is bound to be an overtly political dimension. Bakan is aware of this, but does not allow his own political views—which I suspect may well be anti-corporate, but cannot say for certain—to overwhelm the analysis. The use of interviews attempts to ensure that both sides on a given point are given an airing sufficient to allow readers to make up their own minds about the issues. Furthermore, if, as I believe, one of the points of the book was to stimulate a debate about the role of corporations, disagreement about the book's premises and conclusions should be viewed as a positive development.

Bakan's use of examples drawn from real-life corporate experience provides a contextual grounding for the related analysis. It removes the book from the world of purely academic or theoretical concerns, and should make the book accessible to corporate veterans and those new to business alike. The review of historical developments both in the first chapter generally and more specifically later on allows Bakan to make compelling comparisons between past occurrences and the concerns of today.

He also tries to present solutions to problems that could conceivably be implemented within a reasonable time frame, should the political will exist to do so. He explicitly tries to avoid a utopian view of what our world should be. Instead, a return to a stronger government presence, with a concomitant focus on the public good, is suggested. The solutions espoused are recognized as tentative. No silver bullets or quick fixes are offered. These are difficult issues. If easy solutions were possible, we would likely already have them. Even the solutions proposed may be the subject of heavy debate.

This is not to suggest that I necessarily subscribe to every thesis that Bakan puts forward in the book. I will briefly outline two points of disagreement. First, if, as Bakan claims, the corporation is pathological, does this make the corporation mentally ill? "Pathology" generally refers to an illness of some kind. Clearly, Bakan is focused on mental and emotional attributes—excessive self-interest and lack of genuine concern for others are two examples—as opposed

to physical ones. If the corporation as an institution is mentally ill, does that mean that it also might be legally insane? While mental illness and legal insanity are not synonymous, an argument could be made that the corporation is unable to appreciate that certain acts are legally wrong, because its mandate to care for itself alone—endorsed as it is by legal norms—says that actions taken in the name are inherently right. If an argument for legal insanity can be made, then, arguably, the corporation cannot be held criminally responsible for its actions. Persons who are legally insane cannot be convicted of a crime. Under our current law, however, corporations can be held liable for crimes committed by their respective agents, under certain circumstances. Bakan acknowledges this at one point in the book, although he indicates that such prosecutions are rarely successful. By arguing that the corporation is a pathological institution, Bakan may be—inadvertently, I suspect—suggesting that corporate criminal liability is impossible. The fines resulting from a criminal conviction add to the costs of corporate misbehaviour, thus making misdeeds less attractive to the profit-driven corporation. The thrust of the book is to say that society needs to force government to rebalance its relationship with corporations to be less in favour of corporate interests. The removal of criminal sanctions for corporate wrongdoing through legal insanity would seem to do the opposite. I would love to hear Bakan's views on this point, which is not explicitly dealt with in the book.

Second, Bakan argues that while the corporation is pathological, those who work for them are not. To substantiate this assertion, he points to the fact that corporate executives are often deeply caring people in their personal lives, performing true philanthropy and recognizing their personal obligations to the community. I do not question the fact that many corporate executives are good people in their personal lives. But the fact remains that, if Bakan is right that the corporation is pathological, and executives are the people making these decisions, at the time that an executive is doing so, does he or she in that situation take on and adopt the pathological character of the corporation? Can there not be a situational pathology? Pathology is related to illness. Not all illnesses show all symptoms in every situation. Could this be a pathology found in corporate executives, one whose symptoms appear in individuals only when the individual is making decisions as or on behalf of the corporation?

My object here is neither to resolve these questions, nor to suggest that they necessarily invalidate Bakan's fundamental theses. On the contrary, perhaps the most commendable aspect of the book is that it forces people to ask such questions. I indicated earlier that the suggestions for reform could likely be a subject for debate. If this book is read with open minds by both those who are critical of the corporation as an institution, and those who promote its fundamental virtue as an engine of commercial activity, I suspect that the debate about the corporate form, as it now stands, would begin in earnest. So, I close this review much the way it began. This book made me truly think about

the governing institutional dynamics of the corporation, and it has made me question what I thought I knew. So, bravo, Professor Bakan, for while there will undoubtedly be critics who will say that corporate business as usual suits them just fine, your unique insights and concise style will force them (and other readers) to consider the issues in a different and meaningful way.