



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Appeals

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## DECISION AND REASONS

Appeal No. AP-2019-044

Costco Wholesale Canada Ltd.

v.

President of the Canada Border  
Services Agency

*Decision issued  
Wednesday, February 3, 2021*

*Reasons issued  
Friday, March 19, 2021*

*Corrigendum issued  
Tuesday, June 15, 2021*

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IN THE MATTER OF an appeal heard on October 6 and 7, 2020, pursuant to section 67 of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated November 14, 2019, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

**BETWEEN**

**COSTCO WHOLESALE CANADA LTD.**

**Appellant**

**AND**

**THE PRESIDENT OF THE CANADA BORDER SERVICES  
AGENCY**

**Respondent**

**DECISION**

The appeal is allowed.

Susan D. Beaubien

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Susan D. Beaubien  
Presiding Member

The statement of reasons will be issued at a later date.

IN THE MATTER OF an appeal heard on October 6 and 7, 2020, pursuant to section 67 of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated November 14, 2019, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

**BETWEEN**

**COSTCO WHOLESALE CANADA LTD.**

**Appellant**

**AND**

**THE PRESIDENT OF THE CANADA BORDER SERVICES  
AGENCY**

**Respondent**

**CORRIGENDUM**

Paragraph 1 of the statement of reasons should read as follows:

The Canada Border Services Agency (CBSA) has determined that a product described as “Pokémon Trading Card Tin – 3 Tin Pack,” is classifiable, for the purposes of the *Customs Tariff*,<sup>1</sup> under tariff item no. 9504.40.00 as “playing cards”.

The second sentence of paragraph 3 of the statement of reasons should read as follows:

In its advance ruling, the CBSA concluded that the goods are “playing cards” and that tariff item no. 9504.40.00 is applicable.

Paragraph 18 of the statement of reasons should read as follows:

In deciding to classify the goods under tariff item no. 9504.40.00, the CBSA identified tariff heading 9504 as being the relevant legislative provision.

Susan D. Beaubien

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Susan D. Beaubien

Presiding Member

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<sup>1</sup> S.C. 1997, c. 36.

Place of Hearing: Via videoconference  
Date of Hearing: October 6 and 7, 2020  
Tribunal Panel: Susan Beaubien, Presiding Member  
Support Staff: Zackery Shaver, Counsel

**PARTICIPANTS:****Appellant**

Costco Wholesale Canada Ltd.

**Counsel/Representatives**Michael Sherbo  
Andrew Simkins**Respondent**

President of the Canada Border Services Agency

**Counsel/Representatives**

Carolyn Phan

**WITNESSES:**David Moore  
Owner  
Cardboard Memories Inc.Mark Dizon  
Pokémon TCG World Championship Player

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## STATEMENT OF REASONS

[1] The Canada Border Services Agency (CBSA) has determined that a product described as “Pokémon Trading Card Tin – 3 Tin Pack,” is classifiable, for the purposes of the *Customs Tariff*,<sup>2</sup> under tariff item no. 9504.40.00.90 as “playing cards”.

[2] Costco Wholesale Canada Ltd. (Costco) disagrees and contends that these goods should instead be classified as “[o]ther articles for funfair, table or parlour games” under tariff item no. 9504.90.00.<sup>3</sup>

[3] Costco initially sought an advance ruling from the CBSA, pursuant to section 43.1 of the *Customs Act*.<sup>4</sup> In its advance ruling, the CBSA concluded that the goods are “playing cards” and that tariff item no. 9504.90.00 is applicable.<sup>5</sup> Costco sought a review from the CBSA’s Recourse Directorate,<sup>6</sup> who maintained the decision that the goods are properly classifiable as “playing cards”.<sup>7</sup>

[4] Pursuant to section 67(1) of the *Customs Act*, Costco now appeals this decision to the Tribunal.<sup>8</sup>

## FACTUAL BACKGROUND

[5] Pokémon™ is a Japanese media franchise that was created around 1995. The name “Pokémon” is a short form or contraction of the phrase “pocket monsters” and is used to denote fictional creatures who live in the wild within the Pokémon Universe. The creatures are of different shapes and sizes and have varying abilities and special skills. Each individual Pokémon creature falls within a particular type or category which relates to the special powers and skills possessed by the creature, such as “Fire” type, “Psychic” type and “Dragon” type, among others.

[6] Within the fictional Pokémon Universe, humans seek to acquire or capture the Pokémon creatures in order to train and care for them. As the Pokémon reside with their human owners (known as “Trainers”), the creatures grow and become stronger, and may even evolve into stronger versions of themselves, thus acquiring greater or more far-reaching abilities and powers. Pokémon engage in battle for sport, under the command of their Trainers.

[7] The Pokémon media franchise has been commercialized in the form of video games, television shows, movies, and character merchandizing, including toys and trading card games.

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<sup>2</sup> S.C. 1997, c. 36.

<sup>3</sup> Exhibit AP-2019-044-01.

<sup>4</sup> R.S.C., 1985, c. 1 (2nd Supp.).

<sup>5</sup> Exhibit AP-2019-044-03 at 23.

<sup>6</sup> *Ibid.* at 10.

<sup>7</sup> *Ibid.* at 30; Exhibit AP-2019-044-01 at 9.

<sup>8</sup> Exhibit AP-2019-044-01.

[8] The goods at issue in this appeal are packaged tins comprising Pokémon Trading Card Game (TCG) cards. The CBSA has described the goods as follows:

The goods in issue consist of 3 decorative Pokémon Trading Card Game tins. Each tin contains:

- 1 of 3 special foil Pokémon-EX cards;
- 4 Pokémon Trading Card Game booster packs; and
- A code card to unlock a playable deck in the Pokémon Trading Card Game Online.<sup>9</sup>

[9] The Pokémon-EX cards are special promotional cards.<sup>10</sup>

[10] Each booster pack within each tin comprises 10 Pokémon TCG cards. Each card is printed with the Pokémon logo, the picture and name of the particular Pokémon character, together with other images and text, including instructions on using the card in the Pokémon Trading Card Game (Pokémon TC Game).<sup>11</sup>

[11] In order to play the Pokémon TC Game, each player must have a deck of 60 Pokémon TCG cards. The game's rules require that each player have a deck comprising exactly 60 cards. Players "build" their own deck by acquiring and selecting individual Pokémon TCG cards. As such, each individual deck will be unique.<sup>12</sup>

[12] An individual Pokémon TCG card will fall into one of three categories, i.e. Character cards, Energy cards and Trainer cards.<sup>13</sup>

[13] Character cards are referable to, and depict, a particular Pokémon creature.<sup>14</sup> These cards are used to battle other characters during the course of the game.<sup>15</sup>

[14] Energy cards are used by Pokémon character cards to "attack" opposing Pokémon characters.<sup>16</sup>

[15] Trainer cards serve to progress the game and provide options to a player's Pokémon characters, as reflected by the Character cards held by that player.<sup>17</sup>

[16] Although Pokémon TCG cards are used to play the Pokémon TC Game, they may also be collected and traded. Some individual cards have been advertised to collectors and sold at prices ranging from \$1,250 to \$90,000.<sup>18</sup>

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<sup>9</sup> *Ibid.* at 9.

<sup>10</sup> Exhibit AP-2019-044-14A at 8.

<sup>11</sup> Exhibit AP-2019-044-01 at 9.

<sup>12</sup> *Ibid.* at 9, 11.

<sup>13</sup> Exhibit AP-2019-044-14A at 6.

<sup>14</sup> Pokémon creatures may also be described as "characters".

<sup>15</sup> Exhibit AP-2019-044-14A at 6.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> Exhibit AP-2019-044-03 at 18.

## The CBSA's Decision

[17] The CBSA's decision was rendered on November 14, 2019, pursuant to subsection 60(4) of the *Customs Act*.<sup>19</sup>

[18] In deciding to classify the goods under tariff item no. 9504.90.00, the CBSA identified tariff heading 9504 as being the relevant legislative provision.

[19] The CBSA then considered dictionary definitions of "playing cards".<sup>20</sup> The CBSA interpreted the definition of "playing cards" as extending to cards of various styles used for the playing of various games and not being limited to a deck of 52 cards.

[20] Relying upon Wikipedia entries, the CBSA found that "decks" may be custom-produced for use by casinos and magicians, or for other purposes or end uses, such as for use as promotional items, souvenirs, artistic works, educational tools, branded accessories, trading card sets, or collectibles. The CBSA further noted that different types of card decks can be found in different areas of the world.

[21] The CBSA then considered a definition of "collectible card game," which was characterized as a "strategy card game" consisting of "specially designed sets of playing cards" using proprietary artwork or images to depict various themes, including science fiction, horror genres, cartoons or sports. The CBSA further noted the description of how collectible card games are played, citing a Wikipedia entry, and the prerequisites for playing the Pokémon TCG.

[22] In view of these observations and applying General Interpretative Rules (GIR) 1 and 6, the CBSA concluded that:

As the Pokémon Trading cards are a card game complete with rules, they meet the description of "playing cards". As these are not individual packs, the statistical suffix 90 applies.<sup>21</sup>

[23] Costco filed a notice of appeal with the Tribunal on February 10, 2020.<sup>22</sup>

## Additional Evidence on Appeal

[24] In support of its appeal, Costco filed a brief comprising the record that was before the CBSA and a written argument.<sup>23</sup>

[25] Costco also provided a specimen of the goods at issue for the Tribunal's inspection,<sup>24</sup> and gave notice that it would be calling Mr. Dave Moore, owner of Cardboard Memories Inc., as a fact witness at the hearing of the appeal.<sup>25</sup>

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<sup>19</sup> Exhibit AP-2019-044-01 at 9.

<sup>20</sup> Funk and Wagnalls Standard College Dictionary, Merriam-Webster Dictionary, and Collins Dictionary: Exhibit AP-2019-044-01 at 10-11.

<sup>21</sup> Exhibit AP-2019-044-01 at 11.

<sup>22</sup> Exhibit AP-2019-044-01.

<sup>23</sup> Exhibit AP-2019-044-03.

<sup>24</sup> Exhibit AP-2019-044-A-01.

<sup>25</sup> Exhibit AP-2019-044-16.



[26] The CBSA submitted a brief comprising Costco's application for an advance ruling and supporting materials;<sup>26</sup> numerous articles pertaining to collectible card games;<sup>27</sup> descriptions of the Pokémon TC Game;<sup>28</sup> information on the valuation, collection and trading of Pokémon TCG cards;<sup>29</sup> directions and strategies for designing a Pokémon TCG card deck<sup>30</sup> and playing the Pokémon TC Game.<sup>31</sup>

[27] The brief filed by the CBSA also included dictionary and online definitions for toys and games,<sup>32</sup> "2-Player Starter Set (TCG),"<sup>33</sup> "Booster Pack,"<sup>34</sup> "Card Games,"<sup>35</sup> "Playing Card,"<sup>36</sup> "Playing Cards,"<sup>37</sup> "Pokémon"<sup>38</sup> and "Tarot Game".<sup>39</sup>

[28] Both parties also filed copies of relevant statutory authorities and jurisprudence relied upon.

[29] Prior to the oral hearing, the CBSA tendered the expert report of Mark Dizon,<sup>40</sup> who was put forward as an expert in the playing and teaching of the Pokémon TC Game, and collecting of Pokémon TCG cards.

[30] The CBSA advised that Mr. Dizon's testimony was proposed to include use of an online portal at [www.Pokémon.com](http://www.Pokémon.com) to demonstrate the gameplay of the Pokémon TC Game during the hearing.<sup>41</sup> Costco objected to this procedure. It claimed that Costco's ability to prepare its cross-examination of Mr. Dizon could be prejudiced, as the demonstration of gameplay using the portal was not depicted within Mr. Dizon's expert report and would be presented for the first time during the hearing.<sup>42</sup> The issue was resolved, prior to the hearing, as the CBSA provided Costco with materials (i.e. screenshots, a recording) depicting visual aspects of the Pokémon TC Game and reflective of the gameplay proposed to be demonstrated by Mr. Dizon during his testimony.<sup>43</sup>

## Oral Hearing

[31] An in-person oral hearing was scheduled, but was subsequently cancelled, due to the safety restrictions imposed as a result of the COVID-19 pandemic.<sup>44</sup> Following discussions with the

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<sup>26</sup> Exhibit AP-2019-044-05B (protected).

<sup>27</sup> Exhibit AP-2019-044-05C at 17, 23, 97, 146.

<sup>28</sup> *Ibid.* at 95, 140.

<sup>29</sup> *Ibid.* at 5, 42, 49, 111, 121, 130, 135.

<sup>30</sup> *Ibid.* at 33, 137.

<sup>31</sup> *Ibid.* at 9, 69, 74, 143.

<sup>32</sup> *Ibid.* at 91.

<sup>33</sup> *Ibid.* at 148.

<sup>34</sup> *Ibid.* at 152.

<sup>35</sup> *Ibid.* at 155.

<sup>36</sup> *Ibid.* at 160, 164, 169, 170, 190.

<sup>37</sup> *Ibid.* at 173, 179, 183, 186.

<sup>38</sup> *Ibid.* at 194.

<sup>39</sup> *Ibid.* at 196.

<sup>40</sup> Exhibit AP-2019-044-14A.

<sup>41</sup> Exhibit AP-2019-044-14.

<sup>42</sup> Exhibit AP-2019-044-15.

<sup>43</sup> Exhibit AP-2019-044-17; Exhibit AP-2019-044-17A; *Transcript of Public Hearing* at 3-4.

<sup>44</sup> Exhibit AP-2019-044-06; Exhibit AP-2019-044-08.

parties,<sup>45</sup> the hearing was rescheduled<sup>46</sup> and conducted online as a two-day hearing on October 6 and 7, 2020, using the WebEx platform. Both parties were represented.

David (Dave) Moore

[32] At the hearing, Costco called Mr. Moore as a witness.

[33] Mr. Moore is the owner of a card store in Brampton, Ontario, that he has operated since 1991. He sells sports cards, comic books, trading card games and toys.<sup>47</sup> He has also sold Pokémon TCG cards since approximately 1998-99, when they were introduced into the North American market.

[34] According to Mr. Moore, his store has sold Pokémon TCG cards in various formats, i.e. as single cards, as starter decks, in packs or in tins.<sup>48</sup> Mr. Moore testified that his customer base for Pokémon TCG cards falls into four principal categories.

[35] Adults (parents, grandparents, aunts, uncles) buying gifts for a child comprise the first category. According to Mr. Moore, these purchasers are unfamiliar with the intricacies of the Pokémon franchise. They are primarily concerned with buying a gift that appears substantial and will please the recipient. Typically, this type of customer will require or seek sales help.<sup>49</sup>

[36] The second type of purchaser consists of children or young adults, typically spending gift or allowance money. According to Mr. Moore, these customers are price and value conscious and will tend to gravitate towards Pokémon TCG cards sold in individual packs.<sup>50</sup>

[37] Competitive gamers are the third category of purchaser. Mr. Moore testified that these customers usually have an extensive collection of cards and are unlikely to make large purchases. Gamers trade cards among themselves so the inference from Mr. Moore's testimony is that these customers are only interested in buying targeted cards outside their own collection, which they cannot otherwise obtain by way of trading.<sup>51</sup>

[38] Mr. Moore describes the fourth type of purchaser as "collectors". Often former players of the Pokémon TC Game during childhood, these customers will buy large quantities of product for the purpose of holding it, unopened, until the cards appreciate in value. The items may also be listed for auction or sale on various online sites. Mr. Moore described these types of customers as being "savvy" purchasers who are focused on acquiring particular products for eventual resale as a part of a "micro-business".<sup>52</sup>

[39] Mr. Moore's store also sells accessories for Pokémon TCG cards, including Pokémon-specific binders, binder sheets, holders, soft sleeves, deck protectors and bags for the protective safe storage of cards and decks, regardless of whether the cards are collected, traded or used in gameplay. Play

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<sup>45</sup> Exhibit AP-2019-044-07; Exhibit AP-2019-044-09; Exhibit AP-2019-044-10.

<sup>46</sup> Exhibit AP-2019-044-11; Exhibit AP-2019-044-12.

<sup>47</sup> *Transcript of Public Hearing* at 8-9.

<sup>48</sup> *Ibid.* at 13.

<sup>49</sup> *Ibid.* at 21-22, 24.

<sup>50</sup> *Ibid.* at 22. The individual packs are known as "booster packs".

<sup>51</sup> *Transcript of Public Hearing* at 18, 22.

<sup>52</sup> *Ibid.* at 18, 23-25.

mats are sold and used to protect cards from scratches or other damage while the Pokémon TC Game is being played.<sup>53</sup>

[40] On cross-examination, Mr. Moore stated that his store organizes and runs Pokémon TC Game events and hosts competitive Pokémon TC Game tournaments. Mr. Moore conceded that Pokémon cards are advertised by his store as being playable, but that they are also marketed as collectibles.<sup>54</sup>

#### Mark Dizon

[41] The CBSA called Mark Dizon as an expert witness with respect to the playing and teaching of the Pokémon TC Game and the collecting of Pokémon TCG cards.<sup>55</sup>

[42] Mr. Dizon is a sponsored competitive Pokémon TC Game player. He testifies that he collects, buys, sells and trades Pokémon TCG cards. He has been collecting Pokémon TCG cards for approximately 22 years and has a personal collection of over 20,000 Pokémon TCG cards.<sup>56</sup> He buys, sells and trades Pokémon TCG cards on a daily basis.<sup>57</sup>

[43] In his expert report, Mr. Dizon provides details concerning his career as a competitive player of the Pokémon TC Game. He has been an active member of the Pokémon TCG community since December 2016 and has played trading card games for the past 16 years.<sup>58</sup>

[44] Mr. Dizon competed at the 2018 World Championships held in Nashville, Tennessee and the 2019 World Championships in Washington, D.C. Mr. Dizon had a top 16 finish at the 2018 North America International Championships, which is the second most prestigious tournament after the World Championships. He also had two consecutive top 5 finishes, in competition for top Pokémon player in Canada, during 2018-2019.<sup>59</sup>

[45] In addition to competing in Pokémon TC Game tournaments, Mr. Dizon trains and coaches other competitive Pokémon TC Game players who have competed and placed at international tournaments. He also manages 60cards.net, a Pokémon content website, where his activities include writing articles on Pokémon strategy and game playing.<sup>60</sup>

[46] On average, Mr. Dizon plays the Pokémon TC Game approximately 40 out of 52 weekends of the year. In addition, he also plays and teaches other players in local tournaments once or twice per week. Several game stores sponsor his activities as a competitive player and coach.<sup>61</sup>

[47] As a Pokémon TC Game coach, Mr. Dizon testified that he coaches players concerning the mental aspects of gameplay, including tournament preparation, mental attitude and focus during

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<sup>53</sup> *Ibid.* at 30-33.

<sup>54</sup> *Ibid.* at 45-47.

<sup>55</sup> Exhibit AP-2019-044-14A.

<sup>56</sup> *Ibid.* at 14; *Transcript of Public Hearing* at 60-61.

<sup>57</sup> *Transcript of Public Hearing* at 60-61.

<sup>58</sup> Exhibit AP-2019-044-14A at 3.

<sup>59</sup> *Ibid.* at 3-4; *Transcript of Public Hearing* at 53.

<sup>60</sup> Exhibit AP-2019-044-14A at 3-4; *Transcript of Public Hearing* at 57-58.

<sup>61</sup> *Transcript of Public Hearing* at 54.

gameplay, as well as the strategic aspects of using the cards, making moves and recovering from mistakes.<sup>62</sup>

[48] Mr. Dizon also creates Pokémon TC Game content for the Twitch streaming site, acting as a commentator and demonstrating the competitive playing of the Pokémon TC Game, for both live and interactive audiences.<sup>63</sup> He is recognized as a competitive player by numerous Facebook groups directed to the Pokémon TC Game<sup>64</sup> and is a Pokémon League Organizer. Pokémon leagues are typically hosted by game stores where new players are able to learn the game and prepare for tournament play.<sup>65</sup>

[49] Mr. Dizon also testified about the collection and appraisal of Pokémon TC Game cards, stating that he appraises the value of his cards on a daily basis, particularly by monitoring sales and listing prices on online marketplaces such as eBay, www.TrollandToad.com and www.TCGplayer.com.<sup>66</sup>

[50] Upon cross-examination as to his qualifications, Mr. Dizon conceded that he has never been employed by any company that manufactures Pokémon TCG cards.<sup>67</sup>

[51] The parties disagreed on one aspect of Mr. Dizon's experience and expertise. Costco contends that Mr. Dizon cannot be regarded as an expert with respect to the design of Pokémon TCG cards because the card design and intended use of the cards lie in the mind of the manufacturer. The basis for this objection arises from certain opinions expressed by Mr. Dizon in his expert report. Otherwise, Costco did not object to Mr. Dizon's qualifications as an expert in the playing of the Pokémon TC Game, the collecting of Pokémon TCG cards and the teaching and coaching of others to play the Pokémon TC Game.

[52] The Tribunal admitted Mr. Dizon as an expert witness with respect to the playing of the Pokémon TC Game, the collecting of Pokémon TCG cards and the teaching and coaching of others to play the Pokémon TC Game. The Tribunal noted that playing the Pokémon TC Game would require the ability to understand the card design and layout. To that extent, this involves interpretation of the information printed and presented by the card in the course of playing the game. However, such knowledge does not extend to expertise in game theory or design, from the standpoint of a game designer employed by a manufacturer. Costco appeared to be concerned that Mr. Dizon's evidence would stray into this territory. The Tribunal indicated, at the outset of Mr. Dizon's testimony in chief, that it would deal with any such issues or objections, *ad hoc*, should they arise.<sup>68</sup>

[53] In both his expert report and during his oral testimony, Mr. Dizon explained the nature of the Pokémon TC Game and how it is played. Mr. Dizon provided the Tribunal with an online demonstration of the playing of the Pokémon TC Game.<sup>69</sup>

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<sup>62</sup> *Ibid.* at 55-57.

<sup>63</sup> Exhibit AP-2019-044-14A at 4; *Transcript of Public Hearing* at 58-59.

<sup>64</sup> Exhibit AP-2019-044-14B (protected) at 12; *Transcript of Public Hearing* at 52, 54-55.

<sup>65</sup> *Transcript of Public Hearing* at 59-60.

<sup>66</sup> *Ibid.* at 65-66.

<sup>67</sup> *Ibid.* at 72.

<sup>68</sup> *Ibid.* at 75-78.

<sup>69</sup> *Ibid.* at 155 *et seq.*

[54] The underlying theme of the Pokémon TC Game is to demonstrate life lessons symbolically learned by the Pokémon characters as they battle throughout the game and evolve into higher versions of themselves.<sup>70</sup>

[55] The Pokémon TC Game is played according to a set of game rules which is made available online to all players.<sup>71</sup> It is a game of skill and chance.<sup>72</sup> The game may be played with physical cards or virtual cards.<sup>73</sup>

[56] There is no formal gameboard.<sup>74</sup> The game can be played on any surface but there is a convention concerning the placement of cards as the game unfolds.<sup>75</sup>

[57] More particularly, Mr. Dizon testified how to identify different types of Pokémon TCG cards and described the characteristics and properties of the different card types.

[58] Pokémon character cards feature images of Pokémon characters. Each Pokémon character card shows the name and image of a particular Pokémon character and defines its characteristics, abilities and powers. These cards are used or played to simulate the battling of Pokémon. The card also provides information concerning each character's stage of evolution, strength and rank relative to other characters. Each character also has an energy type referable to elements such as grass, fire, water, psychic and fighting.<sup>76</sup>

[59] In the course of battling other characters, each Pokémon is able to inflict damage upon opposing Pokémon and sustain incoming energy damage from opponents, which is measured by "hit points".<sup>77</sup> A character's "hit points" are noted on the card. The character cards are played in conjunction with Energy cards.

[60] During the course of the game, the players keep track of energy lost by a Pokémon character, which is measured by subtracting that character's "hit points".<sup>78</sup> Dice or other items may be used as counters for lost hit points.<sup>79</sup> When a Pokémon character loses all of its hit points, it is retired from the game. The Pokémon can be "healed" to recover its hit points and later return to the game.<sup>80</sup>

[61] Energy cards have a particular theme and are played under the Pokémon character cards to simulate the energy needed by Pokémon character cards to attack. The various energy types may have competitive advantages relative to one another.<sup>81</sup>

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<sup>70</sup> *Transcript of Public Hearing* at 85-88.

<sup>71</sup> *Ibid.* at 126-128.

<sup>72</sup> *Ibid.* at 129-130.

<sup>73</sup> *Ibid.* at 149-153.

<sup>74</sup> Gameboards of various types are an optional accessory. See *Transcript of Public Hearing* at 135-136.

<sup>75</sup> *Transcript of Public Hearing* at 115, 124-125.

<sup>76</sup> *Ibid.* at 93-94, 196-198.

<sup>77</sup> *Ibid.* at 168-169.

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.* at 251-252.

<sup>80</sup> *Ibid.* at 92.

<sup>81</sup> *Ibid.* at 195.

[62] Trainer cards move the game in accordance with rules printed on the cards.<sup>82</sup> They provide instructions and directions to players<sup>83</sup> and will typically comprise 40 to 50 percent of the cards in a player's deck.<sup>84</sup>

[63] In Mr. Dizon's opinion, the characteristics of the Pokémon TCG cards are analogous to suits in a modern standard 52-card deck. The Pokémon TCG cards have an "elemental" typing which will afford priority or relative dominance over another card. Mr. Dizon explains this in the following way: "Fire [card] will be weak to water [card] while Grass [card] will be weak to Fire [card] . . . ."<sup>85</sup>

[64] Every Pokémon TCG card also has a prize value. At the beginning of the game, each player selects a set of cards from his or her deck to be used as prize cards within the game.<sup>86</sup> If a player retires an opposing Pokémon character, he or she may select a prize card.<sup>87</sup>

[65] Each Pokémon TC Game will be different because the assortment of prize cards, selected by the players from their individual customized decks, will differ every time.<sup>88</sup>

[66] A player can win the game by taking all of his or her prize cards, by retiring all of the opposing Pokémon characters, or if his or her opponent runs out of cards.<sup>89</sup>

[67] Mr. Dizon also described how a Pokémon TCG card deck is built for competitive gameplay and the underlying strategic objectives in constructing a deck and using it during competitive play, up to and including competition at the World Championship level.<sup>90</sup>

[68] The objective is for a player to build an optimal deck using the best cards available and to tailor that deck to the player's strategy for playing the game.<sup>91</sup> The permutations and combinations of cards comprising a deck is proportional to the number of cards available to the player. Cards may be drawn from the player's personal collection of cards, acquired through purchase of booster packs or individual cards (purchased *à la carte*). Cards may also be borrowed from other players.<sup>92</sup>

[69] As new cards are continually released, some cards are retired. The players of the Pokémon TC Game are continuously devising optimal strategies for gameplay which involves building new decks by removing and adding new cards with different attributes and features.<sup>93</sup>

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<sup>82</sup> *Ibid.* at 84-85.

<sup>83</sup> Including, for example, providing restoration or "healing" to a character card that has exhausted its hit points.

<sup>84</sup> *Transcript of Public Hearing* at 100.

<sup>85</sup> Exhibit AP-2019-044-14A.

<sup>86</sup> *Transcript of Public Hearing* at 125-126.

<sup>87</sup> *Ibid.* at 169-170.

<sup>88</sup> *Ibid.* at 174-176.

<sup>89</sup> *Ibid.* at 128-129.

<sup>90</sup> *Ibid.* at 103-107.

<sup>91</sup> *Ibid.* at 103, 250.

<sup>92</sup> *Ibid.* at 105-106.

<sup>93</sup> Exhibit AP-2019-044-14A at 7-8.

[70] Only cards that have been released within the past two years may be used in competitive play.<sup>94</sup> The goods at issue were released in 2016, near the end of their lifespan<sup>95</sup> and are no longer eligible for use in competition play, at least at the tournament level.<sup>96</sup>

[71] Players may bring multiple decks to a game and then decide, based on the games being played by others, which deck to select and use.<sup>97</sup> Players may keep cards in protective sleeves in order to prevent nicks and other damage that may ensue from shuffling and handling.<sup>98</sup>

[72] Mr. Dizon testified that the game is kept fresh by the release and addition of new cards, which also serves as an incentive for players to keep buying cards.<sup>99</sup>

[73] Cards may be sold, acquired or purchased in a variety of formats, whether individually or packaged in booster packs, boxes or a tin (as is the case for the goods at issue)<sup>100</sup>.

[74] The purchase of booster packs may yield duplicates or cards otherwise of disinterest to the purchaser. Experienced players may purchase newly released sets of cards in large quantities (up of \$1,000) to acquire the best cards for their collection, leaving the remaining cards that were otherwise purchased to be sold or traded to others.<sup>101</sup>

[75] Some Pokémon TCG cards are released as promotions. The depicted character and its attributes are the same as a regular card, but promotional cards are not contained within booster packs. They may be included as part of other sales presentations, including the tins of the goods at issue.<sup>102</sup>

[76] Mr. Dizon further explained that every Pokémon TCG card is also ranked and marked for rarity. Cards marked with a circle are common, cards with a diamond are uncommon and cards with a star are rare.<sup>103</sup> The degree of card “rarity” within a deck may be a strategic consideration in building or using a deck in a particular game.<sup>104</sup> However, a player may wish to keep or collect uncommon or rare cards, as opposed to using them in competitive play.<sup>105</sup>

[77] Pokémon TCG cards can also be bought, traded and sold for profit.<sup>106</sup> Some cards have a high value<sup>107</sup> and are collected as being akin to pieces of art.<sup>108</sup> Some promotional cards may be of

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<sup>94</sup> *Transcript of Public Hearing* at 108.

<sup>95</sup> *Ibid.* at 213-214.

<sup>96</sup> *Ibid.* at 201-203.

<sup>97</sup> *Ibid.* at 244-245.

<sup>98</sup> *Ibid.* at 127.

<sup>99</sup> *Ibid.* at 107.

<sup>100</sup> *Ibid.* at 140-142.

<sup>101</sup> *Ibid.* at 203-204.

<sup>102</sup> *Ibid.* at 207-208.

<sup>103</sup> Exhibit AP-2019-044-14A at 7.

<sup>104</sup> *Ibid.*

<sup>105</sup> *Transcript of Public Hearing* at 204-206.

<sup>106</sup> *Ibid.* at 232, 242.

<sup>107</sup> In at least one case, valued at \$90,000.

<sup>108</sup> *Transcript of Public Hearing* at 215-218.

higher value as a collectible.<sup>109</sup> The value of individual cards may fluctuate over time and may be determined, at any given time, by consulting online marketplaces.<sup>110</sup>

[78] Mr. Dizon opined that cards sold in the format such as the goods at issue are unlikely to contain cards having a high value as collector's pieces.<sup>111</sup> In his opinion, the Pokémon TCG cards from the goods at issue are meant to be played and their possible collectible value is secondary.<sup>112</sup>

[79] Mr. Dizon distinguishes the Pokémon TCG cards in the goods at issue with a line of collectible Pokémon cards released by Topps Company. around 1999. The Topps collectible Pokémon cards were not associated with any games but instead were referable to a Pokémon movie and television programming.<sup>113</sup>

[80] With respect to the goods at issue, the artwork on the exterior of the tins will communicate to the player/purchaser that she/he will be able to acquire a TCG card for the specific Pokémon character depicted on the exterior of the tin.<sup>114</sup> Typically, this will be a specific powerful Pokémon character that will be useful for competitive play, as opposed to cards packaged in booster packs, whose acquisition is associated with pure chance. Cards within the booster packs are a randomized assortment of cards.<sup>115</sup> The purchase of randomized cards in booster packs carries the risk that the enclosed cards will have "low power levels" which will have little to no play value.

[81] The code card included in each booster pack within the tin is a type of "gift with purchase" item, which may be exchanged for an online booster pack of virtual cards for online play.<sup>116</sup> The codes may also be sold, traded or otherwise bartered with other players and may thus function as a form of online currency.<sup>117</sup>

[82] The code cards provide online access to virtual gameplay and thus serve as an accessory to the physical cards.<sup>118</sup> In order to play the Pokémon TC Game online, a player must compile an online deck of virtual cards. The online decks are assembled from a player's collection of virtual cards, underpinned by the same strategic objectives applicable to compilation of a physical deck. Mr. Dizon testified that he has 76 individual decks of online cards.<sup>119</sup>

[83] The only way to acquire virtual cards is by way of the code cards which are found in booster packs containing physical cards. As such, a player wishing to assemble virtual cards must purchase booster packs or otherwise acquire code cards that are contained within booster packs.

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<sup>109</sup> *Ibid.* at 238-241.

<sup>110</sup> *Ibid.* at 209-210.

<sup>111</sup> *Ibid.* at 222-227.

<sup>112</sup> *Ibid.*; Exhibit AP-2019-044-14A at 8.

<sup>113</sup> Exhibit AP-2019-044-14A at 6-7.

<sup>114</sup> For the goods at issue, the Pokemon character on the tin was named Zygarde EX. See *Transcript of Public Hearing* at 139.

<sup>115</sup> *Transcript of Public Hearing* at 140.

<sup>116</sup> *Ibid.* at 143-144.

<sup>117</sup> *Ibid.* at 158-160.

<sup>118</sup> *Ibid.* at 154.

<sup>119</sup> *Ibid.* at 172.



[84] The tin may serve as an accessory for the storage of cards or decks.<sup>120</sup>

[85] During the course of his online testimony, Mr. Dizon demonstrated and used some additional materials comprising protective sleeves for Pokémon TCG cards, additional rare Pokémon TCG cards and playing mats for the Pokémon TC Game. The CBSA submitted copies of this material to complete the record, post-hearing.<sup>121</sup>

[86] The Tribunal found that both Mr. Moore and Mr. Dizon were honest witnesses who tried to be helpful. At some points during Mr. Dizon's testimony, he analogized certain aspects of the Pokémon TCG cards to suits in a modern deck of cards. Mr. Dizon was not qualified as an expert in games that are playable using a standard or modern 52-card deck or with respect to any other types of cards. His expertise is confined to Pokémon TCG cards and the playing of the Pokémon TC Game. To the extent that his testimony extended beyond that, the Tribunal has assigned it little weight.

[87] Following the testimony given by Mr. Moore and Mr. Dizon at the hearing, both parties submitted oral arguments to the Tribunal.

## **POSITIONS OF THE PARTIES ON APPEAL**

### **Costco**

[88] Costco submits that the classification analysis must begin with subheading 9504.40 – “Playing Cards” and whether Pokémon TCG cards are “playing cards”. Referencing entries from the *Cambridge English Dictionary*, *Oxford Dictionary* and *Merriam-Webster Dictionary*, Costco asserts that the universal common feature of “playing cards” is that they are numbered and divided into suits.

[89] Costco contends that this interpretation is consistent with the term “playing cards” as used in provisions of the former *Excise Act*.

[90] As Pokémon TCG cards are neither numbered nor divided into suits, Costco submits that they do not fall within the scope of the definition of “playing cards”. Costco argues that the exclusion from subheading 9504.40 is reinforced by the fact that Pokémon TCG cards are marketed, sold and used as trading cards having, in some cases, a very high value as collectibles.

[91] Costco says that, by classifying the goods as “playing cards,” the CBSA has erred by adopting an overly broad reading of subheading 9504.40. In essence, the CBSA has construed subheading 9504.40 as pertaining to “card games of all kinds” or “cards of all kinds” instead of “playing cards”. By doing so, Costco asserts that the CBSA has misapplied the principles of statutory interpretation.

[92] Consequently, as subheading 9504.40 is inapplicable, Costco submits that the goods are thus properly classified under subheading 9504.90 – “Other, Video games consoles and machines, articles for funfair, table or parlour games, including pintables, billiards, special tables for casino games and automatic bowling alley equipment”.

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<sup>120</sup> *Ibid.* at 143.

<sup>121</sup> Exhibit AP-2019-044-21; Exhibit AP-2019-044-22; Exhibit AP-2019-044-23.

## CBSA

[93] The CBSA summarized the legal framework for the determination of tariff classification, beginning with section 10 of the *Customs Act* and the requirement that the classification of imported goods be determined in accordance with the GIR and the *Canadian Rules*.

[94] At issue in the appeal is the applicable subheading within heading 9504. The CBSA notes that the parties agree that heading 9504 applies to the goods but disagree as to whether the correct subheading is 9504.40 or 9504.90.

[95] As the term “playing cards” is not explicitly defined by the *Customs Tariff*, the CBSA looks to the *Explanatory Notes to the Harmonized Commodity Description and Coding System*<sup>122</sup> and observes that Note 11 covers “card games of all kinds (bridge, tarot, lexicon, etc)”.

[96] In order to be classified in subheading 9504.40, the CBSA contends that the goods must consequently be “playing cards” for “card games of all kinds” and that both of these conditions are met here. The CBSA further argues that subheading 9504.90 is residual and need not be given further consideration once the goods are found to fall within the scope of subheading 9504.40.

[97] The CBSA cites and relies upon definitions for “playing cards” and “playing card” as taken from the *Oxford English Dictionary*, the *Oxford Pocket Dictionary of Current English*, the *Collins English Dictionary*, the *MacMillan Dictionary*, *The American Heritage Dictionary*, *The Chambers Dictionary*, the *Encyclopedia Britannica*, the *Columbia Encyclopedia* and Encyclopedia.com.

[98] The CBSA asserts that “playing cards” have the following common characteristics: (1) they form part of a set or pack of cards; (2) they are thin pieces of cardboard; and (3) they are used for playing games. All of these characteristics are met by Pokémon TCG cards, according to the CBSA.

[99] The Explanatory Note to heading 95.04 refers to “card games of all kinds” with a non-exhaustive list of examples. In view of expansive dictionary definitions for the term “card games,” the CBSA submits that “card games” are thus not limited to games using a “modern” or standard 52-card deck. Although bridge is played with a standard 52-card deck, other examples of card games listed in Note 11 use different decks, such as tarot, which uses a 54- to 78-card deck, and the word game of *lexicon*, which is played with a 52-card pack printed with alphanumeric values. According to the CBSA, “card games” must consequently be read broadly as extending to “collectible card games”.

[100] The Pokémon TC Game is played with a deck of 60 cards, composed of character and non-character cards. The CBSA submits that these cards are shuffled, drawn and dealt between players in a game of chance and skill. The evolution, creation and variation as between decks, which may occur as a player gains experience, is said by the CBSA to be consistent with card games “of all kinds”. Although the trading of cards is possible, and perhaps even encouraged, a player is able to build a deck and play the Pokémon TC Game without the use of cards that have been traded.

[101] The CBSA submits that the design, characteristics, marketing and pricing of the goods further support its conclusion that the goods are intended for playing a card game. Notwithstanding

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<sup>122</sup> Customs Co-operation Council, 2d ed., Brussels, 1996 [*Explanatory Notes*].

that the goods include storage tins and electronic access codes for online gaming, the CBSA says that the goods are primarily focused on the assortment of character and non-character cards in sealed envelopes. A surplus number of cards (123) is included, which is noteworthy, given that the Pokémon TC Game requires a deck of exactly 60 cards, no more and no less.

[102] The CBSA further contends that opening booster packs to discover new Pokémon characters underscores the element of chance, which is consistent with the design of the Pokémon TC Game. Use of the terms “card game” and “game cards” on product packaging is said to underscore the play value of the goods.

[103] Moreover, the CBSA also says that the pricing of the goods is inconsistent with the expected price of collectibles. As any item can acquire value over time, the fact that some Pokémon TCG cards may be collectibles, does not change the intrinsic nature of the goods for the purpose of tariff classification.

[104] The CBSA submits Costco is advancing an unduly restrictive interpretation of “playing cards”. Moreover, the fact that Pokémon TCG cards may be collected or traded is not sufficient to displace their classification in subheading 9504.40. If that were the case, argues the CBSA, any playing card (including special print editions) of a modern deck collected by hobbyists could not be classified in subheading 9504.40.

[105] Accordingly, the CBSA argues that residual subheading 9504.90 has no application.

## ANALYSIS

[106] Costco’s appeal is brought pursuant to subsection 67(1) of the *Customs Act*, which provides that a “person aggrieved” by a decision of the CBSA may appeal that decision to the Tribunal by filing a notice of appeal within the prescribed timeframe. There is no dispute that Costco is a “person aggrieved,”<sup>123</sup> for the purposes of section 67(1).

[107] Sections 10 and 11 of the *Customs Tariff* prescribe the analytical approach that the Tribunal must adopt when determining how goods are to be classified:

**10 (1)** Subject to subsection (2), the classification of imported goods under a tariff item shall, unless otherwise provided, be determined in accordance with the General Rules for the Interpretation of the Harmonized System and the Canadian Rules set out in the schedule.

**(2)** Goods shall not be classified under a tariff item that contains the phrase “within access commitment” unless the goods are imported under the authority of a permit issued under section 8.3 of the *Export and Import Permits Act* and in compliance with the conditions of the permit.

**11** In interpreting the headings and subheadings, regard shall be had to the Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System and the Explanatory Notes to the Harmonized Commodity Description and Coding System, published by the Customs Co-operation Council (also known as the World Customs Organization), as amended from time to time.

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<sup>123</sup> *Danson Décor Inc. v. President of the Canada Border Services Agency* (25 September 2019), AP 2018-043 (CITT) [*Danson Décor*], at paras. 75-79.

[108] The *General Rules* are intended to be applied pursuant to a sequential, hierarchical analysis of the goods, as described by the Supreme Court of Canada in *Canada (Attorney General) v. Igloo Vikski Inc.*<sup>124</sup>

[109] In performing this analysis, section 11 requires that the Tribunal also consider the *Explanatory Notes*, as may be relevant and applicable to the goods at issue. The Tribunal should respect the guidance of the *Explanatory Notes* unless there is good reason to depart from it.<sup>125</sup>

[110] The Tribunal owes no deference to the decision reached at first instance by the CBSA. An appeal before the Tribunal is heard *de novo*, even though one or both parties may decide to carry forward all or part of the record at first instance or to supplement that record with new evidence. On the basis of the appellate record, the Tribunal must reach its own decision concerning the correct tariff classification for the goods. In doing so, the Tribunal is free to assess the record before it, up to and including the reweighing of evidence placed before the CBSA and giving new consideration to any new evidence that may be presented on appeal.<sup>126</sup>

[111] In this case, the issue for determination is quite narrow. The parties agree that the goods at issue fall in heading 9504 – “Video game consoles and machines, articles for funfair, table or parlour games, including pintables, billiards, special tables for casino games and automatic bowling alley equipment”<sup>127</sup> of Chapter 95 – “Toys, games and sports requisites; parts and accessories thereof”.<sup>128</sup> The dispute lies at the subheading level. If the goods at issue are “playing cards,” they are properly classified in subheading 9504.40. If they are not, then the residual subheading of 9504.90 will apply.

[112] The relevant provisions of the *Customs Tariff* and *Explanatory Notes* are as follows:

<p><b>SECTION XX: MISCELLANEOUS MANUFACTURED ARTICLES CHAPTER 95 TOYS, GAMES AND SPORTS REQUISITES; PARTS AND ACCESSORIES THEREOF</b></p>	<p><b>SECTION XX : MARCHANDISES ET PRODUITS DIVERS CHAPITRE 95 JOUETS, JEUX, ARTICLES POUR DIVERTISSEMENTS OU POUR SPORTS, LEURS PARTIES ET ACCESSOIRES</b></p>
<p><b>95.04</b> Video game consoles and machines, articles for funfair, table or parlour games, including pintables, billiards, special tables for casino games and automatic bowling alley equipment.</p> <p>...</p> <p><b>9504.40.00</b> - -Playing cards</p>	<p><b>95.04</b> Consoles et machines de jeux vidéo, articles pour jeux de société, y compris les jeux à moteur ou à mouvement, les billards, les tables spéciales pour jeux de casino et les jeux de quilles automatiques (bowlings, par exemple).</p> <p>[...]</p> <p><b>9504.40.00</b> -Cartes à jouer</p>

<sup>124</sup> 2016 SCC 38, [*Igloo Vikski*] at paras. 4-8.

<sup>125</sup> *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131.

<sup>126</sup> *Danson Décor* at paras. 75-79.

<sup>127</sup> *Customs Tariff*.

<sup>128</sup> *Ibid.*

[113] The *Explanatory Notes* to heading 95.04 read as follows:

**95.04-** Video game consoles and machines, articles for funfair, table or parlour games, including pintables, billiards, special tables for casino games and automatic bowling alley equipment.

This heading includes:

(11) Card games of all kinds (bridge, tarot, “lexicon,” etc.).

**95.04:** Consoles et machines de jeux vidéo, articles pour jeux de société, y compris les jeux à moteur ou à mouvement, les billards, les tables spéciales pour jeux de casino et les jeux de quilles automatiques (bowlings, par exemple).

Parmi les articles repris dans la présente position, on peut citer :

(11) Les jeux de cartes de toutes sortes et de toutes dimensions (bridge, tarot, lexicon, etc.).

[114] The tariff classification proposed by Costco reads as follows:

**95.04 Video game consoles and machines, articles for funfair, table or parlour games, including pintables, billiards, special tables for casino games and automatic bowling alley equipment.**

...

**95.04 Consoles et machines de jeux vidéo, articles pour jeux de société, y compris les jeux à moteur ou à mouvement, les billards, les tables spéciales pour jeux de casino et les jeux de quilles automatiques (bowlings, par exemple).**

[...]

**9504.40.00 - -Playing cards**

**9504.40.00 -Cartes à jouer**

[115] Dictionary definitions from several sources have been filed as evidence on this appeal by both parties. Those dictionary definitions pertain to both “playing card” and “playing cards”. However, there is an important distinction as between the definition of “playing card” (singular) and “playing cards” (plural).

[116] Although the definitions are not fully coterminous, from dictionary to dictionary, the overall meaning is shared and consistent. The term “playing card” is defined as being referable to a single card (usually made from a thin piece of cardboard) that is part of a larger whole, namely a set or deck of cards used in the playing of games.

[117] The Tribunal finds that the predominant feature underpinning the dictionary definition of “playing cards” is that it refers to a set or deck comprising a plurality of individual cards that may be used to play a game.

[118] The tariff subheading at issue is “playing cards” not “playing card”.

[119] The concept of “playability” is inherent to the definition of “playing cards”. A deck of playing cards is thus characterized by being “playable” and thus ready to use at time of purchase. Those are the goods that the purchaser is buying.

[120] As such, it is inherent to the nature of a deck of “playing cards” that the deck be of uniform composition with respect to its included cards and their size, markings and presentation. One packaged deck selected from a store shelf will be the same as the next.<sup>129</sup> The number of cards and

<sup>129</sup> Assuming, of course, that both decks originate from the same manufacturer and the same product line.

their markings will be indistinguishable from pack to pack. This is not limited to the modern or standard deck of 52 cards; it applies to other decks such as tarot cards, etc.

[121] A deck of cards (such as a modern 52-card deck) may be used to play any number of games such as bridge, poker, rummy, whist, etc. The rules differ from game to game, but the cards themselves remain the same and the composition of the deck remains unchanged, varying only to the extent that the rules of the particular game so require.

[122] This is not the case for the Pokémon TC Game where there is no uniform deck in common use by all players in the game. Instead, each player of the Pokémon TC Game has his/her own customized deck of self-selected cards chosen as part of a game strategy. The decks are inherently customizable and variable from player to player. The players of the game are not using a common deck of “playing cards” of uniform composition. The cards within a Pokémon deck are thus “game cards” but not “playing cards” within the meaning of “playing cards” as discussed above.

[123] The Pokémon TC Game is not a “card game” in the strict sense. Rather, it is a game of strategy with that strategy manifesting itself at a minimum of two levels, i.e. constructing a playable deck from the cards that a player has, buys, or is otherwise able to acquire and then playing the game according to its rules using the deck or decks that the player has built.

[124] Mr. Dizon testified that players of the Pokémon TC Game may own several, if not many decks, which may be strategically selected for use in a particular game or competition. Based on Mr. Dizon’s evidence, the Tribunal finds this to be common practice and not limited to players of Mr. Dizon’s experience and skill. It is a question of degree; some players may own or have greater access to playable decks than others, but the objective of creating a library or collection of useful, playable decks is a uniform one. A larger collection of decks increases the player’s competitiveness, as he/ she will have more choices to strategically select a deck tailored to best meet the challenges of a particular game and opponents who will be bringing their own customized deck to that game.

[125] The Pokémon TC Game is thus analogous to competitive sports where one team will field a starting line-up of players whose talent and skills are best matched to offset the strengths of players on the opposing team or to take advantage of the weaknesses of the opposing players. The team’s starting line-up may change, in some cases depending on the expected starting line-up of the other team.

[126] An owner of Pokémon TCG cards used for gameplay is not dissimilar to a sports team owner who may acquire or trade for players in order to improve the team’s overall competitiveness. In the Pokémon TC Game, the “players” are cards reflecting fictional characters and supporting tools (energy and training cards) that may enhance the abilities of the characters to compete (or battle) within the game. Unlike the owner of a sports team or franchise with a single team, Pokémon TCG “team owners” have a plurality of “teams” that they “own,” having built those teams as playable decks using individual Pokémon TCG cards that are purchased or acquired, essentially serving as building blocks.

[127] It is settled law that the Tribunal must assess the goods, for classification purposes, as of the date of importation into Canada.<sup>130</sup> In doing so, the Tribunal must consider the goods in their entirety as an operable product. The Tribunal may not deconstruct the product and effect classification of the product *solely* with reference to its constituent parts.<sup>131</sup>

[128] At the time of importation through to purchase, the goods comprise a random assortment of wrapped Pokémon TCG cards that remain concealed from the buyer until they are unwrapped from their foil packaging; a computer access code that can be redeemed to unlock an online version of the game; a specific Pokémon character card that is a powerful character having high game value; and a tin bearing the likeness of the special character.

[129] The purchaser of the goods at issue is therefore not buying a “pack” or “deck” of playing cards. Rather, the purchaser is buying a set of components or building blocks from which a playable deck may be constructed, together with accessories that may be useful for competitive gameplay.

[130] The tin will contain enough (if not an excess) number of cards to assemble into the requisite size of deck for the playing of the Pokémon TC Game, but this does not define a ready-to-use or “playable” deck that is inherent to the definition of “playing cards”. Although a single tin will contain over 120 cards, the card distribution is entirely random. It may (or may not) comprise a sufficient number of cards having high enough play value to construct a deck that is satisfactory to the player and the player’s game objectives.

[131] The goods at issue are thus not “playing cards” because they do not comprise or include cards that are “playable”. In the form as purchased, the cards cannot be used to play the Pokémon TC Game which requires the creation of a deck. There is no deck unless or until the purchased cards are selected for inclusion within a deck, as a function of skill and judgment that is exercised by the player. The cards must be strategically compiled into a deck which is likely to require at least one, and likely more, steps to be taken, post-purchase. This exercise may entail the use or acquisition of other cards that are not even contained or included within the purchased tin.

[132] Unlike a deck of conventional playing cards which have a uniform composition at point of purchase and are thus ready-to-use for “play,” the buyer of the goods at issue is not assured of acquiring a playable deck. The cards within the tin may include duplicates, too many “weak” cards or an insufficient number of cards that are “strong” enough to be included within viable and playable deck.

[133] Moreover, there is no evidence to suggest, much less demonstrate, that Pokémon TC cards can be used to play any other game besides the Pokémon TC Game.

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<sup>130</sup> *Komatsu International (Canada) Inc. v. President of the Canada Border Services Agency* (10 April 2012), AP-2010-006 (CITT) at para. 22; *Rona Inc. v. President of the Canada Border Services Agency* (5 November 2019), AP-2018-053 (CITT) at para. 81 [*Rona*].

<sup>131</sup> *Tiffany Woodworth v. President of the Canada Border Services Agency* (11 September 2007), AP-2006-035 (CITT) at para. 21; *Rona* at para. 81.

[134] The Tribunal inspected and opened one of the booster packs contained within a sample of the goods that was filed by Costco. The foil wrapper enclosing the cards was labelled “game cards”. Inside the pack were six Pokémon character cards labelled “Basic,”<sup>132</sup> two Trainer cards,<sup>133</sup> a Pokémon character card labelled “Stage 1”<sup>134</sup> and a foil-embossed character card labelled “Mega”.<sup>135</sup> Also included was a card marked “Online Rewards Await You – Expand Your Game, Play Online!” with a redeemable code for use at [www.Pokémon.com/tcgo](http://www.Pokémon.com/tcgo).

[135] This inspection serves to reinforce the conclusion that the player is not purchasing “playing cards”. In the sample that was examined, one category of card (Energy) needed for the game was missing completely and the number of Trainer cards in the booster pack was disproportionately low relative to the number that would be needed within a deck<sup>136</sup> in order to play the game.

[136] While the perceived value of the tin and the computer access code may be secondary to the primary purpose of acquiring cards, these items still form part of the goods at issue. The Tribunal must consider the goods as they are at the time of importation. For practical purposes, the goods at issue are identical at the time of importation and point of sale to the consumer.

[137] The computer access code cannot be described as a “playing card”. Rather, it functions as a form of scrip or ticket that provides *de facto* admission to the online version of the game once the code is redeemed. Mr. Dizon testified that the online game may be used as a form of practice, perhaps to “test” the playability of a particular deck that a player has built or to engage in competitive play.<sup>137</sup>

[138] The components of the goods are packaged in a tin. Unlike most forms of packaging that is intended to be disposed of post-purchase, the Tribunal finds that the tin has utility as a game accessory. This utility would be used by a player to store and sort the player’s individual cards or to house a collection of Pokémon TCG card decks.

[139] Accordingly, the consumer has not purchased “playing cards” and that term does not describe the goods at issue, as the goods are a composite of several individual items that may be considered useful for players of the Pokémon TC Game. In arriving at this conclusion, the Tribunal has considered the relevant Explanatory Note.

[140] Even if the Tribunal were to examine *only* the Pokémon TCG cards contained and packaged within the tin, the goods could still not be classified as “playing cards” under tariff item no. 9504.40.00.90.

[141] The Tribunal agrees with the CBSA that the term “playing cards” is not necessarily limited to the standard or modern deck. There are different types of “playing cards” and many different “card games” that may be played using “playing cards”. While the Tribunal also agrees that

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<sup>132</sup> The characters were named Seel, Charmander, Diglett, Drowzee, Caterpie, and Farfetch’d. The Farfetch’d card was finished or overlaid with an additional layer of embossed foil.

<sup>133</sup> Labelled “Slobro Spirit Link” and “Super Potion”.

<sup>134</sup> The character is named Charmeleon.

<sup>135</sup> The character is named Charizard.

<sup>136</sup> From 40 to 50 percent according to Mr. Dizon.

<sup>137</sup> *Transcript of Public Hearing* at 137; Exhibit AP-2019-044-17A at 10-17.



“playing cards” may be used for “card games,”<sup>138</sup> not all “card games” are consequentially “playing cards”, and not all cards used for games are consequentially “playing cards”. There are many games, such as board games of various types, which use cards or “game cards”. This would not mean that such games are necessarily “playing cards,” having regard to the other aspects and features of the game.

[142] The term “playing cards” does not describe the goods at issue. The booster packs contained within the goods are labelled as “game cards”. Having regard to the evidence concerning the nature of the Pokémon TC Game, how the game is played and the overall uses and contextual role of the cards, the Tribunal finds that “game cards” aptly describes Pokémon TCG cards, at least in the marketing format which characterizes the goods at issue.

[143] To arrive at the conclusion urged by the CBSA, the Tribunal would need to find that the wording “playing cards,” as used in the Tariff, is synonymous and interchangeable with the term “card games” used in the *Explanatory Notes*. The *Explanatory Notes* are a guide to interpretation of the terminology used in the Tariff. However, the wording in the *Explanatory Notes* cannot override or redraft the language used in the Tariff.

[144] For the reasons given above, the goods at issue are not “playing cards”. To find otherwise would be to ascribe an overly expansive meaning to the term “playing cards” that the words cannot bear, on a purposive interpretation.

[145] Pokémon TCG cards may be marketed and sold in other presentations such as “starter decks”.<sup>139</sup> Such goods may or may not attract a different classification within the Tariff, but that issue is not before the Tribunal for decision.

[146] Accordingly, the goods at issue are not classifiable in subheading 9504.40 as “playing cards”. Consequently, the residual category of 9504.90 is the correct subheading for classification.

[147] The *Customs Act* imposes the legal burden on an appellant to demonstrate that goods have been incorrectly classified pursuant to the *Customs Tariff*.<sup>140</sup> A legal burden is discharged where the party bearing that onus demonstrates to a court or tribunal that the outcome that it seeks is more likely to be correct than not (balance of probabilities), based on an assessment of all of the evidence that has been tendered.<sup>141</sup>

[148] For the reasons given above, Costco has discharged that burden. The appeal is allowed.

Susan D. Beaubien

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Susan D. Beaubien

Presiding Member

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<sup>138</sup> Among other uses, such as performing magic tricks.

<sup>139</sup> *Transcript of Public Hearing* at 13-15.

<sup>140</sup> *Customs Act* at s. 152.

<sup>141</sup> *F.H. v. McDougall*, 2008 SCC 53, at paras. 40-49; *Morrison v. The Queen*, 2018 TCC 220, at paras. 65-89.